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In the Supreme Court

OF THE

United States

October Term, 1986

DEAN WITTER REYNOLDS INC.
Petitioner,

vs.

HERBERT BLUMENTHAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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QUESTIONS PRESENTED

The questions presented are:

(1) Whether the United States Arbitration Act mandates arbitration of a claim arising under Section 10(b) of the Securities Exchange Act of 1934, if that claim is otherwise referable to arbitration under an agreement between the parties; and

(2) Whether the United States Arbitration Act mandates arbitration of a claim arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), where the predicate acts supporting the claim are alleged violations of Section 10(b) of the Securities Exchange Act of 1934.

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DEAN WITTER REYNOLDS INC.
Petitioner,

VS.

HERBERT BLUMENTHAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 797 F.2d 1197 (3d Cir. 1986). The order of the district court (Pet. App. B), and its opinion (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was filed and entered on August 11, 1986. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are set forth in full in the appendix (Pet. App. D). The citations to the statutes and regulations are as follows:

United States Arbitration Act,
Section 2, 9 U.S.C. § 2
Section 3, 9 U.S.C. § 3

Racketeer Influenced and Corrupt Organizations Act,
Section 1962(b), 18 U.S.C. § 1962(b)
Section 1962(c), 18 U.S.C. § 1962(c)
Section 1964(c), 18 U.S.C. § 1964(c)

Securities Act of 1933,
Section 12(2), 15 U.S.C. § 77 1(2)
Section 14, 15 U.S.C. § 77n
Section 22(a), 15 U.S.C. § 77v(a)

Securities Exchange Act of 1934,
Section 10(b), 15 U.S.C. § 78j(b)
Section 29(a), 15 U.S.C. § 78cc(a)

Securities and Exchange Commisssion,
Rule 10b-5, 17 C.F.R. § 240.10b-5.

STATEMENT OF THE CASE

Plaintiff and respondent Herbert Blumenthal (hereinafter "respondent") filed his complaint in the United States District Court for the District of New Jersey against defendant and petitioner Dean Witter Reynolds Inc.[1] (hereinafter "Dean Witter" or "petitioner") and

[1]Petitioner Dean Witter Reynolds Inc. is a wholly-owned subsidiary of Dean Witter Financial Services, Inc., which is itself a wholly-owned subsidiary of Sears, Roebuck & Co.

defendant Daniel J. Turov[2] (hereinafter "Turov") on November 20, 1984. The complaint consists of four claims for relief. Respondent's first claim is for alleged violation of § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b), hereinafter the "Exchange Act") and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated thereunder by the Securities and Exchange Commission. Respondent's second claim for relief is for alleged violations of §§ 1962(b) and (c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(b) and (c) (hereinafter "RICO").

Respondent's remaining two claims are based on alleged violations of state law. Respondent denominated these pendent state claims as "Common Law Fraud and Breach of Fiduciary and Other Duties" and "N.Y. General Business Law § 349."

Respondent alleges that § 27 of the Exchange Act (15 U.S.C. § 78aa), §§ 1964 and 1965 of RICO (18 U.S.C. §§ 1964 and 1965), and the principle of pendent jurisdiction are the bases for subject matter jurisdiction of the respondent's claims in the federal district court.

The allegations supporting respondent's claims for relief include, *inter alia,* that respondent opened a securities account with petitioner at Turov's request; that Turov recommended to respondent speculative investments inconsistent with respondent's needs; that Turov sold most of the stocks in respondent's account and invested the proceeds in speculative securities without respondent's

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[2]Daniel J. Turov, formerly an employee of petitioner, is a named defendant in the district court action. Mr. Turov joined in the motion denied in the district court, see note 3 *infra* and accompanying text, but was not a party to the appeal from that denial in the court of appeals. Mr. Truov nevertheless remains a party in the district court action.

prior authorization; and that the trading in respondent's account was excessive. Respondent asserts that petitioner is liable for all of this conduct because Turov's acts are alleged to have been within the scope of his employment with petitioner.

In November of 1982, when respondent commenced doing business with Dean Witter, a written contract was entered into governing the conduct of respondent's securities account. That contract, the "Securities Account Agreement", contains a provision requiring arbitration of any controversy arising out of the conduct of the account. (Pet. App. E).

In response to the complaint, Dean Witter by motion sought an order dismissing respondent's claims or, in the alternative, an order compelling arbitration of respondent's claims.[3] In support of its request that respondent's Complaint be arbitrated, Dean Witter relied on its written Securities Account Agreement with respondent and on the mandate of the United States Arbitration Act ("Arbitration Act"). Defendant Turov joined in the motion to dismiss the claim for relief alleged under RICO.

By its order entered July 22, 1985 (Pet. App. B), the district court partly denied and partly granted Dean Witter's motion. The court denied that portion of the motion that sought arbitration of respondent's claims under § 10(b) of the Exchange Act and Rico, but ordered arbitration of the state law claims, and stayed further proceedings on the federal claims pending completion of the arbitration. With respect to compelling arbitration of the § 10(b) claim, the district court stated:

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[3]The motion filed by petitioner in the district court is entitled "Motion to Dismiss the Complaint and its Individual Counts, and in the Alternate, to Stay this Action and Direct Plaintiff to Proceed in Arbitration."

> It is not this court's obligation or prerogative to depart from the law as encunciated by the Supreme Court and the Third Circuit. Even if the last rites have been administered in *Scherk* and Justice White's concurring opinion in *Byrd,* the proposition of law that a section 10(b) 1934 Act claim is not arbitrable has not yet been declared dead, and this court is not privileged to administer the *coup de grace.* Pet. App. C at C-10.

The United States Court of Appeals for the Third Circuit affirmed that portion of the district court's order denying arbitration of the § 10(b) claim stating that "no subsequent Supreme Court decision may fairly be construed to have overruled *Ayers*[4] [sic], [and] that opinion binds this panel." Pet. App. A at A-12. (Footnote added). With respect to the arbitration of RICO claims, the court of appeals held that "[b]ecause the heart of the dispute still will be over whether the securities laws were violated, RICO plaintiffs relying on Section 10(b) violations are, by virtue of section 29(a) of the 1934 Act, entitled to a judicial resolution of their RICO claims" but that "RICO claims based on mail and wire fraud fall within the arbitration clause as written, and no federal statute prohibits application of the arbitration clause." Pet. App. A at A-14. The court of appeals therefore held that respondent's RICO claim based on alleged mail and wire fraud would be arbitrated, but that his RICO claim based on alleged violations of § 10(b) would be judicially resolved.

ARGUMENT

The decision of the court of appeals is incorrect and should be reviewed by this Court.

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[4] *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976).

I

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE QUESTION OF THE ENFORCEABILITY OF AGREEMENTS TO ARBITRATE CLAIMS UNDER SECTION 10(b) OF THE EXCHANGE ACT

A. The Decision of the Court of Appeals for the Third Circuit While in Agreement With the Decisions of the Second, Fifth, Ninth, and Eleventh Circuits, Conflicts With the Decision of the Eighth Circuit.

This Court's decision in *Dean Witter Reynolds Inc. v. Byrd*[5] left open the question of whether arbitration of claims arising under § 10(b) of the Exchange Act can be compelled.[6] Since *Byrd*, the courts of appeals which have considered this question have rendered conflicting decisions. The Third Circuit in the instant case, as well as the Second[7], Fifth[8] and Eleventh[9] Circuits, have refused enforcement of agreements to arbitrate claims arising under § 10(b), relying to a great extent on the precedent of prior decisions within those circuits. The Ninth Circuit[10]

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[5]105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

[6]*Id.* at 1240 n. 1, 84 L.Ed.2d at 162 n. 1.

[7]*McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 2567 (U.S. July 14, 1986) (No. 86-44).

[8]*King v. Drexel Burnham Lambert, Inc.*, 791 F.2d 929 (5th Cir. 1986) (without formal opinion), *petition for cert. filed*, 55 U.S.L.W. 3152 (U.S. August 25, 1986) (No. 86-282).

[9]*Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850 (11th Cir. 1986) (per curiam).

[10]*Conover v. Dean Witter Reynolds Inc.*, 794 F.2d 520 (9th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3159 (U.S. August 29, 1986) (No. 86-321).

has also denied enforcement of an agreement to arbitrate a § 10(b) claim, relying instead on its perception of conflicting policies evidenced by the statutes at issue, and of the applicability of the analysis and precepts of this Court's decision in *Wilko v. Swan.*[11] In contrast, the Eighth Circuit[12] has held that agreements to arbitrate claims asserted under § 10(b) are enforceable, concluding that Congress created no exception to the mandate of the Arbitration Act for claims under § 10(b).

Resolution of this conflict among the circuits is necessary in order to achieve uniform application of federal law. Parties in the Second, Fifth, Third, Ninth, and Eleventh Circuits currently are being denied their contractual right to arbitration based on an erroneous reading of this Court's decision in *Wilko v. Swan.*[13] In the instant case, for example, the Third Circuit referenced its prior decision in *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[14] in which it "applied the *Wilko* rule"[15] to § 10(b) claims and concluded that *Ayres* was binding on the panel.[16]

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[11]346 U.S. 427 (1953).

[12]*Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

[13]*Id.*

[14]538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976).

[15]Pet. App. A at A-10.

[16]*Id.* Judge Adams, however, concurring in part and dissenting in part in the instant case, noted that while the Rule 10b-5 determination in *Ayres* has been cited as an "independent and controlling holding" in the Third Circuit, that determination was "at best an alternative basis of the result reached." Pet. App. A at A-18. Judge Adams nevertheless concluded that "although I have some reservations regarding the wisdom of nonarbitrability, I concur in the

In *Wilko v. Swan*, a divided Supreme Court held that a pre-dispute agreement to arbitrate claims under § 12(2) of the Securities Act of 1933[17] (the "Securities Act") was not enforceable. In so ruling, the Court relied on three interconnected statutory provisions: (1) § 14 of the Securities Act which voids any "stipulation . . . binding any person acquiring any security to waive compliance with any provision" of the Securities Act; (2) § 12(2), which grants a "special right" differing substantially from common law actions in that it does not require proof of scienter; and (3) § 22 which allows claims based on the Securities Act to be brought in either state or federal court. The Court in *Wilko* concluded that an agreement to arbitrate § 12(2) claims was void because it was a stipulation waiving a "provision" of the Securities Act and limited the "special" protections Congress expressly conferred on purchasers in passing the Securities Act.

Wilko's reasoning cannot be mechanically transplanted to the Exchange Act.[18] In substantially undermining the decisions of the lower courts which have held that § 10(b) claims are not arbitrable, Justice White in his concurring opinion in *Byrd* emphasized the salient differences between §§ 12(2) and 10(b):[19]

> While § 29 of . . . [the Exchange] Act, 15 U.S.C. § 78cc(a), is equivalent to § 14 of the 1933 Act, counterparts of the other two provisions are imperfect or absent altogether. Jurisdiction under the 1934 Act is narrower, being restricted to the federal

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majority's conclusion that *Ayres* dictates in this Circuit the nonarbitrability of causes of action premised on Rule 10b-5." *Id.* at A-21.

[17] 15 U.S.C. § 77*l*(2).

[18] *Dean Witter Reynolds Inc. v. Byrd*, 105 S.Ct. at 1244, 84 L.Ed.2d at 167 (White, J., concurring.)

[19] *Id.*

> courts. 15 U.S.C. § 78aa. More important, the cause of action under § 10(b) and Rule 10b-5, involved here, is implied rather than express. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 380, and nn. 9-10 . . . (1983). The phrase 'waive compliance with any *provision of this chapter,*' 15 U.S.C. § 78cc(a) (emphasis added), is thus literally inapplicable. Moreover, *Wilko's* solicitude for the federal cause of action — the 'special right' established by Congress, 346 U.S., at 431, 74 S.Ct., at 184 — is not necessarily appropriate where the cause of action is judicially implied and not so different from the common law action.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,*[20] this Court, specifically relying upon Justice White's concurring opinion in *Byrd,* stated that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."[21] In the case of § 10(b), and other implied rights of action, the burden to find a "congressional intention expressed [in the] statute" simply cannot be satisfied. The existence and contours of implied rights of action under § 10(b), are judicially, not legislatively, created.[22] Indeed, this Court has already stated that "[w]hile federal case law has established that § 10(b) and Rule 10b-5 create an implied private cause of action, . . . the Act itself does not establish the 'special right' that the Court in *Wilko* found significant."[23]

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[20]105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

[21]*Id.* at 3355, 87 L.Ed.2d at 456.

[22]*Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 749 (1975).

[23]*Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 513-14 (1974).

Unlike the express right of action under § 12(2), the judicially implied right of action under § 10(b) cannot be considered part of the statutory scheme of the Exchange Act. Accordingly, the congressional intention to exclude arbitration, which is at the heart of *Wilko,* is lacking here. Thus, under the analysis of *Mitsubishi,* the powerful congressional policy manifested in the Arbitration Act, described by Justice Blackmun in *Mitsubishi* as "the emphatic federal policy in favor of arbitral dispute resolution,"[24] is controlling and § 10(b) claims are arbitrable. This Court should therefore resolve the conflict between the circuit courts of appeal by holding that the Arbitration Act mandates arbitration of judicially implied claims under § 10(b) when those claims are otherwise referable to arbitration under an agreement between the parties.

B. The Decision of the Court of Appeals is in Conflict With an Applicable Decision of This Court.

The decision reached by the Third Circuit and the previous decisions of the Second, Fifth, Ninth, and Eleventh Circuits concerning enforceability of agreements to arbitrate claims under § 10(b) of the Exchange Act conflict with this Court's recent decision in *Mitsubishi Motors v. Soler Chrysler-Plymouth.*[25] In *Mitsubishi,* this Court held that the Arbitration Act mandates arbitration of claims arising under the Sherman Act[26] in the context of an international commercial transaction, and rejected a number of the premises supporting the Third Circuit's conclusion that agreements to arbitrate § 10(b) claims should not be enforced. In the instant case, the Third Circuit relied primarily on the precedent of its prior decision in *Ayres* for its holding. The *Ayres* court found

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[24]105 S.Ct. at 3356-57, 87 L.Ed.2d at 458.

[25]105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

[26]15 U.S.C. §1, *et seq.*

the reasoning of *Wilko* applicable to claims under Section 10(b) of the Exchange Act and stated:

> We need not review here the fundamental and important differences between litigation in a court and arbitration. It is enough to say that the Supreme Court found prospective waivers of the right to judicial trial and review to be inconsistent with Congress' overriding concern for the protection of investors.[27]

This reasoning, enunciated in *Ayres* and adopted in the instant case, is incorrect. Under the analysis prescribed in *Mitsubishi,* the focus of any inquiry concerning arbitrability of federal statutory claims must begin with an analysis of the intent of Congress.

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. See Wilko v. Swan, 346 U.S., at 434-435, 74 S. Ct. at 186-187; Southland Corp., 465 U.S., at ____, 104 S. Ct. at 861 n.11; Dean Witter Reynolds Inc., ____ U.S., at ____, 105 S. Ct. at 1239-1240 (concurring opinion).[28]

The Third Circuit's focus in *Ayres* on the "differences between litigation . . . and arbitration" and "Congress' overriding concern for the protection of investors" was premised on two erroneous underlying presumptions: (1) that the arbitration process is biased or unfair, and (2)

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[27]538 F.2d at 536 (citations and footnote omitted).

[28]105 S. Ct. at 3355, 87 L.Ed. 2d at 456.

that the statutory rights at issue can not or will not be properly vindicated in arbitration. Both presumptions were explicitly rejected in *Mitsubishi.*[29] With respect to the former, this Court reasoned:[30]

> We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.

With respect to the latter, the Court concluded:[31]

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

As this Court observed in *Mitsubishi,* "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[32] The likelihood of such vindication in the § 10(b) context is enhanced by the fact that § 10(b) claims are "not so different from the common law action."[33] Claims

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[29]Both presumptions can be inferred from the Third Circuit's language in *Ayres,* which was supported by citation to *Wilko v. Swan.* In light of this Court's ruling in *Mitsubishi,* to the extent *Wilko* can be read to support these presumptions it should be disapproved.

[30]105 S. Ct. at 3358, 87 L.Ed.2d at 460.

[31]*Id.* at 3355, 87 L.Ed.2d at 456.

[32]*Id.* at 3359-60, 87 L.Ed.2d at 461-62.

[33]*Dean Witter Reynolds Inc. v. Byrd,* 105 S.Ct. at 1244, 84 L.Ed.2d at 168 (White, J., concurring).

for common law fraud are regularly sent to arbitration and resolved by arbitrators.[34]

Since the justifications for denial of arbitration of § 10(b) claims by the Third Circuit were rejected by this Court in *Mitsubishi,* the decision in the instant case requires this Court's review.

C. The Decision of the Court of Appeals Will Serve to Increase Litigation in the Federal Courts.

The decision of the court of appeals in the instant case will have the practical effect of clogging federal court dockets with broker/customer disputes which should be resolved in arbitration. The substantial increase in filings of Securities and Commodities Exchange civil cases in recent years,[35] suggests that enforcement of arbitration agreements with respect to claims under § 10(b) would ease the strain on the legal system in general and the judiciary in particular caused by such filings.

As this Court stated in *Mitsubishi,* "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitration tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[36] In *Scherk v. Alberto-Culver*

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[34]*See, e.g., Southland Corp. v. Keating,* 465 U.S. 1, 4 (1984).

[35]During the twelve months ended June 30, 1980, 1,532 private civil actions classified as "Securities, Commodities, and Exchanges" suits were commenced in United States District Courts. Annual Report of the Director of the Administrative Office of the United States Courts, Table C 2 at 375 (1980). For the twelve months ended June 30, 1984, 3,072 such actions were commenced. Annual Report of the Director of the Administrative Office of the United States Courts, Table C 2 at 283 (1985). Thus, in five years the number of such filings doubled. The increase in civil filings of all kinds increased by only 48% during the same period. *Id.,* Table 7 at 10.

[36]105 S.Ct. at 3354, 87 L.Ed.2d at 455.

Co.,[37] the Court referred to "[t]he exception to the clear provisions of the Arbitration Act carved out by *Wilko*"[38] and held that the *Wilko* exception was inapposite to that case. The recognition of an additional exception to the Arbitration Act for judicially implied claims under § 10(b) of the Exchange Act, an exception which Congress did not intend, will risk further emasculation of the Act and create uncertainty and disuse of alternative dispute resolution mechanisms such as arbitration at a time when their use is desperately needed.

II

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE QUESTION OF THE ENFORCEABILITY OF AGREEMENTS TO ARBITRATE CLAIMS UNDER RICO.

A. The Decision of the Court of Appeals for the Third Circuit Concerning Enforceability of Agreements to Arbitrate Claims Under RICO Conflicts With the Decision of the Second Circuit.

The courts of appeal which have considered the enforceability of agreements to arbitrate claims under RICO have rendered conflicting decisions. The Second Circuit has refused enforcement of agreements to arbitrate RICO claims, holding that arbitration of such claims is inappropriate because of strong public policy considerations, the need for development of the record, and the need for judicial construction of a "relatively new" statute.[39] The

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[37] 417 U.S. 506 (1974).

[38] *Id.* at 517.

[39] *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 98-99, (2d Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 2567 (U.S. July 14, 1986) (No. 86-44).

Third Circuit in the instant case eschewed the solicitude of the Second Circuit for judicially recognized public policy concerns and, noting the absence of any anti-waiver provision in RICO, compelled arbitration of the RICO claims asserted by the respondent herein based on alleged mail and wire fraud. The Third Circuit refused, however, to compel arbitration of respondent's RICO claims where the predicate acts are alleged violations of § 10(b) of the Exchange Act. In contrast, the Second Circuit has held that RICO claims are nonarbitrable regardless of the predicate acts alleged.

Resolution of this conflict among the circuits is necessary in order to achieve uniform application of federal law. Parties in the Second Circuit are being denied their contractual right to arbitration of all RICO claims. Parties in the Third Circuit, while being granted their right to compel arbitration of RICO claims based on underlying predicate acts of mail fraud and wire fraud, are being denied their contractual right to arbitration of RICO claims where the predicate acts are alleged violations of § 10(b) of the Exchange Act.

In the instant case, the Third Circuit's reasoning for its denial of arbitration of RICO claims based on such predicate acts was grounded in two erroneous premises. First, in articulating the appropriate inquiry for determining whether arbitration of claims asserted under RICO may be compelled, the Third Circuit stated that "[b]ecause of the unique structure of the RICO statute, which cross-references other predicate statutes, we must, in making the statutory interpretation required by *Wilko* and *Mitsubishi,* look to those statutes as well."[40]

This inquiry ignores the unique nature of the private right of action under RICO and its distinction from a

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[40]Pet. App. A at A-13.

claim based on a predicate act alone. As this Court stated in *Sedima, S.P.R.L. v. Imrex Co.,*[41] "mere commission of the predicate offenses" is "not in itself a violation of § 1962."[42] The language a "pattern of racketeering activity" is defined in § 1961(5) of the statute as "requir[ing] at least two acts of racketeering activity." As this Court has noted "[t]he implication is that while two acts are necessary, they are not sufficient."[43] Numerous courts since *Sedima* have held that the phrase "pattern of racketeering activity" requires that proof of "continuity plus relationship" be shown as to the predicate acts or racketeering activities.[44]

Constructions of other portions of RICO's language also distinguish claims based on predicate acts alone from RICO claims. For example, virtually all courts have held that a RICO claim cannot be asserted against the "enterprise" involved in the alleged violation,[45] while a

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[41]105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[42]*Id.* at 3285, 87 L.Ed.2d at 359.

[43]*Id.* at 3285 n. 14, 87 L.Ed.2d at 358 n. 14. This Court in *Sedima* also recognized that the legislative history supports such a conclusion, and quoted the statement of the sponsor of RICO that " '[t]he term "pattern" itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . .' 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan)." *Id.*

[44]See, e.g., *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 256-57 (8th Cir. 1986) and cases cited therein at note 8; *Medallion TV Enterprises, Inc. v. SelecTV of California, Inc.*, 627 F.Supp. 1290, 1295-97 (C.D.Cal. 1986); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 831-33 (N.D.Ill. 1985).

[45]*See, Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 634 (3d Cir. 1984); *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984); *Haroco, Inc. v. American*

§ 10(b) claim can be so asserted. The language of the statute — requiring that a "person" take some action affecting an "enterprise" has been held to require that the "person" and the "enterprise" be distinct. Holding the "enterprise" itself liable for unlawful conduct would undermine the statutory goal of protecting legitimate enterprises from criminal infiltration.

These constructions of the RICO statute suggest that an inquiry which focuses on the predicate acts as violations separable from the statutory scheme as a whole misconstrues the nature of the statute.[46] The correct inquiry, an examination of the text and legislative history of RICO itself, reveals that "there is simply no indication that Congress intended to foreclose application of the Arbitration Act to RICO claims."[47] RICO has no anti-waiver provision, nor is there evidence anywhere in the legislative history of an intent to preclude arbitration of

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National Bank & Trust Co., 747 F.2d 384, 400-02 (7th Cir. 1984), *aff'd on other grounds*, 105 S.Ct. 3291, (1985); *United States v. Computer Science Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1060-61 (8th Cir. 1982), *adopted with comment*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983). *But see, United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

[46]The error in the Third Circuit's approach is clearly seen upon examining other predicate acts which constitute "racketeering activity" under RICO. While in the instant case the Third Circuit examined securities fraud statutes for evidence of anti-waiver language as to judicial fora for private rights of action, other predicate acts, e.g., mail fraud and wire fraud, do not even provide a civil claimant with a private right of action other than as a component of a civil RICO claim. See *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) (wire fraud), *cert. denied*, 423 U.S. 837 (1975); *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178-1179 (6th Cir. 1979) (mail fraud).

[47]Pet. App. A at A-28 (Adams, J., concurring in part and dissenting in part).

RICO claims. To borrow the language of a district court which considered the issue:

> The parties here agreed to arbitrate any claims arising from their transactions, and the plaintiffs' RICO claims arose from those transactions. If arbitration of such claims is to be prohibited, it must be done by Congress, not the Court.[48]

Moreover, the Third Circuit's decision in the instant case to compel arbitration of certain RICO claims but not to compel arbitration of others is itself testimony to the lack of Congressional intent to preclude arbitration of RICO claims.

The second erroneous premise upon which the Third Circuit based its reasoning is derived from the first. After concluding that the arbitrability of RICO claims is in part determined by an analysis of the arbitrability of claims asserted under the predicate act statutes, the Third Circuit concluded that its prior precedent as to § 10(b) claims precluded compelling arbitration of such claims. The statutes at issue and recent decisions of this Court, however, require that agreements to arbitrate § 10(b) claims be enforced.[49]

This Court should resolve the conflict between the decisions of the courts of appeals by holding that the United States Arbitration Act mandates arbitration of a claim arising under RICO regardless of the nature of the predicate acts supporting the claim, if the claim is otherwise referable to arbitration under an agreement between the parties.

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[48] *Brener v. Becker Paribas Inc.*, 628 F.Supp. 442, 450 (S.D.N.Y. 1985).

[49] See discussion at pages 5-14 *supra*.

B. The Decision of the Court of Appeals as to Arbitrability of Claims Under RICO Conflicts With an Applicable Decision of This Court.

The Third Circuit decision in the instant case ignores the clear language of *Mitsubishi*[50]. According to this Court, any "protection against waiver of the right to a judicial forum" must be found in the text or legislative history of the "given statute," in this case RICO. The "statutory rights at issue" similarly relate in this case to RICO, not to a claim under § 10(b).[51]

The analysis used by the Third Circuit to conclude that arbitration of RICO claims predicated on alleged violations of § 10(b) cannot be compelled conflicts with that prescribed by this Court in *Mitsubishi* for determining arbitrability of federal statutory claims. The decision of the Third Circuit therefore requires this Court's review.

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[50]105 S.Ct. at 3355, 87 L.Ed.2d at 456.

[51]The Third Circuit's analysis appears to have its origin in a misperception of RICO. In support of its decision in the instant case the court noted that "[t]here is no evidence that Congress intended that the availability of RICO remedies for section 10(b) should suspend the operation of the anti-waiver provision of the Securities Exchange Act of 1934." Pet. App. A at A-14. The phraseology "RICO remedies for section 10(b)" suggests that the Third Circuit views civil RICO as merely an increased damage remedy for repeated violations of the underlying predicate acts, rather than as an independent statutory scheme with purposes and goals beyond the scope of the remedial statutes which constitute the predicate acts. As noted *supra*, this construction conflicts with the text and legislative history of RICO, and with the post-*Sedima* judicial construction of the requirements of the statute.

C. The Decision of the Court of Appeals Concerning Arbitration of RICO Claims Resurrects the Doctrine of Intertwining Disapproved in *Dean Witter Reynolds v. Byrd.*

In *Dean Witter Reynolds Inc. v. Byrd*[52] this Court rejected the "doctrine of intertwining", under which it had been held that "[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court . . . may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court."[53] The decision of the Third Circuit in this case creates a variation of the intertwining doctrine to prevent arbitration. Although acknowledging that "RICO contains no anti-waiver provision" and that RICO claims are otherwise arbitrable, the Third Circuit declined to enforce the arbitration clause in this case to the extent that the predicate acts were alleged violations of § 10(b). The Third Circuit in essence has created a new intertwining exception to arbitration by holding that when an arbitrable RICO claim is intertwined with a predicate act based on a statute as to which arbitration of claims is precluded, the RICO claim itself cannot be arbitrated.[54]

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[52]105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

[53]*Id.* at 1240, 84 L.Ed.2d at 162-63 (footnote omitted).

[54]A second variation of the doctrine of intertwining will also occur as a result of the Third Circuit's decision in the instant case. Since the "pattern of racketeering activity" required to be shown under 18 U.S.C. § 1962 requires at least two acts of racketeering activity under 18 U.S.C. § 1961(5), cases will arise under the Third Circuit's decision in which one of the predicate acts supporting the RICO claim is an alleged violation of an "arbitrable" statute, e.g., mail fraud or wire fraud, while the other predicate act is an alleged violation of a "nonarbitrable" statute such as § 10(b) of the Exchange Act. Under the Third Circuit's reasoning, since the predicate

Because the decision of the Third Circuit resurrects a variation of the doctrine of intertwining rejected by this Court in *Byrd,* review of the decision in the instant case is warranted.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Third Circuit.

DATED: October 2, 1986

Respectfully submitted,

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acts would be intertwined, and since no severance of the claim could occur because of the necessity of two predicate acts under 18 U.S.C. § 1961(5), presumably the claim would be judicially resolved. This result reflects the error in considering a RICO claim to be little more than a treble damage remedy for repeated violations of existing statutes.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3282, 85-3311 and 85-3343

ESTELLE JACOBSON AND CYNTHIA CARSON
Appellants in Nos. 85-3311 and 85-3343

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC. and ROBERT M. KOLACZYNSKI,
Appellants in No. 85-3282

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA - PITTSBURGH
D.C. Civ. No. 84-1844

Argued April 17, 1986
Before: ADAMS, GIBBONS, and MANSMANN,
Circuit Judges

Nos. 85-5517 and 85-5542

MARILYN E. BURRIS

v.

PAINE, WEBBER, JACKSON and CURTIS, INC.,
SMITH BARNEY, HARRIS UPHAM & CO., INC.,
and DONALD J. PORTER
Smith Barney, Harris Upham
& Co., Inc., Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY - NEWARK
D.C. Civ. No. 83-3087

Submitted Under Third Circuit
Rule 12(6) April 14, 1986

No. 85-5439

ELLIS GANT

v.

KIDDER, PEABODY & CO., INC. and FRANK E.
GATTA, JR., Jointly and Severally
Kidder, Peabody & Co., Inc., Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY - NEWARK
D.C. Civ. No. 84-5025

Submitted Under Third Circuit
Rule 12(6)-April 14, 1986

No. 85-5552

HERBERT BLUMENTHAL

v.

DEAN WITTER REYNOLDS INC. and
DANIEL J. TUROV
Dean Witter Reynolds Inc., Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY-NEWARK
D.C. Civ. No. 84-4799

Submitted Under Third Circuit
Rule 12(6) April 14, 1986

No. 85-1541

MICHAEL ERLBAUM

v.

PRUDENTIAL-BACHE SECURITIES, INC. and
SAMUEL ALAN LIEBMAN

Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civ. No. 84-5541

Submitted Under Third Circuit
Rule 12(6) April 14, 1986
(OPINION FILED: AUGUST 11, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

This opinion deals with five interlocutory appeals presenting similar legal issues. All five appeals present the issue whether subsequent decisions of the United States Supreme Court have overruled this court's holding in *Ayers v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010, (1976), that claims against brokerage firms for violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), are not arbitrable. Two of the five appeals present the additional issue whether claims arising under sections 1962(a) and 1962(c) of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(a), (c) (1982) are arbitrable. Both these appeals present the issue whether a RICO claim is arbitrable when the predicate offenses on which it is based are section 10(b) violations. One of the appeals

also presents the issue whether RICO claims are arbitrable when the predicate offenses are mail and wire fraud.

All the appeals are properly before us.[1] We affirm the orders denying the brokerage firms' motions to compel arbitration of the section 10(b) claims. We reverse the portion of the order in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* Nos. 85-3282, 85-3311, and 85-3343, compelling arbitration of the RICO claim that was based on violations of section 10(b). We also reverse the portion of the order in *Blumenthal v. Dean Witter Reynolds, Inc.,* No. 85-5552, denying the motion to compel arbitration of RICO claims that are based on predicate acts of mail and wire fraud but affirm the portion of the order denying arbitration of a RICO claim based on section 10(b) violations.[2]

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[1]Orders granting or denying motions to compel arbitration in actions seeking damages at law are appealable of right under 28 U.S.C. § 1292(a)(1982). See e.g. Cost Brothers, Inc. v. Travelers Indemnity Co., 760 F.2d 58, 59 n. 1 (3d Cir. 1985); Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 51-52 (3d Cir. 1983); McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032, 1034-35 (3d Cir. 1974). All notices of appeal were timely. While two of the district courts certified the § 10(b) arbitration question under 28 U.S.C. § 1292(b)(1982), such certifications were not necessary.

[2]Our holding that RICO claims based on nonarbitrable predicate offenses are not arbitrable conflicts with the holding of the Court of Appeals for the Second Circuit in McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986). In addition our holding that § 10(b) claims are not arbitrable is consistent with the Court of Appeals for the Ninth Circuit decision in Conover v. Dean Witter Reynolds, No. 85-6082 (9th Cir. July 17, 1986) but conflicts with the holding of the Court of Appeals for the Eighth Circuit in Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 85-5156 (8th Cir. July 9, 1986). According to the parties the issues presented by these appeals are pending in the following courts of appeals:

I.

All the plaintiffs were customers with trading accounts at brokerage firms, and all executed agreements in which they consented to arbitrate all controversies arising out of transaction affecting their accounts. Typical of these

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First Circuit

Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., No. 83-2851-C (D.Mass. July 16, 1985) (appeal pending) (dealing with the arbitrability of § 10(b) claims).

Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-3240-N (D.Mass. July 19, 1985) (appeal pending) (dealing with the arbitrability of § 10(b) and RICO claims).

Third Circuit

Fabi v. Dean Witter Reynolds, Inc., No. 85-2881 (D.N.J. Nov. 21, 1985) (appeal pending) (§ 10(b) issue).

Horn v. Merrill Lynch, Pierce, Fenner & Smith, Inc., appeal docketed, No. 86-5215 (3d Cir.) (appeal pending) (§ 10(b) and RICO issues).

Fourth Circuit

Land v. Dean Witter Reynolds, Inc., 617 F.Supp.52 (E.D.Va. 1985) (appeal pending) (§ 10(b) and RICO issues).

Fifth Circuit

Beck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., appeal docketed, No. 86-2051 (5th Cir.) (RICO issue only).

Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., appeal docketed, No. 85-1310 (5th Cir. Mar. 28, 1986) (request for rehearing pending) (RICO issue only).

Sixth Circuit

Lerchen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 83-CV-1479-DT (E.D.Mich. Nov. 29, 1985) (appeal pending) (§ 10(b) and RICO issues).

Sterne v. Dean Witter Reynolds, Inc., C-1-85-24 (S.D. Ohio Jan. 16, 1986) (appeal pending) (dealing with § 10(b) issue).

Drazdik v. Kidder Peabody & Co., Inc., C85-2442 (N.D.Ohio Mar. 3, 1986) (appeal pending) (§ 10(b) issue).

Eighth Circuit

Webb v. R. Rowland & Co., Inc., 613 F.Supp. 1123 (E.D.Mo. 1985) (appeal pending) (§ 10(b) issue).

agreements is the standard Customer Agreement used by Merrill Lynch, Pierce, Fenner & Smith, Inc. which provides,

> It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration of the National Association of Securities Dealers, Inc., as the undersigned may elect. . . . Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of intention to arbi-

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Ninth Circuit

Badart v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-6448 (C.D.Cal. July 25, 1985) (appeal pending) (§ 10(b) issue).

Battershall v. A.G. Becker, Inc., appeal docketed, No. 85-6073 (9th Cir.) (appeal pending) (§ 10(b) issue).

Delman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. CV 84-3869 (C.D.Cal. June 25, 1985) (appeal pending) (§ 10(b) issue).

Hamling v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. CV 84-5194 (C.D. Cal. May 15, 1985) (appeal pending) (§ 10(b) issue).

Stratton v. Dean Witter Reynolds, Inc., No. 85-1028 (S.D.Cal. Aug. 12, 1985) (appeal pending) (§ 10(b) issue).

Felkner v. Dean Witter Reynolds, Inc., No. CV 84-3267 (C.D.Cal. May 6, 1985) (appeal pending) (RICO issue).

Eleventh Circuit

Gorman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., appeal docketed, No. 85-5419 (11th Cir. Dec. 19, 1985) (request for rehearing in banc granted) (§ 10(b) issue).

Miller v. Dean Witter Reynolds, Inc., No. 84-1079 (S.D.Ala. July 25, 1985) (appeal pending) (§ 10(b) issue).

Roberts v. Lehman Brothers Kuhn Loeb, Inc., No. 84-1421 (S.D.Fla. June 22, 1985) (appeal pending) (§ 10(b) issue).

Wolfe v. E.F. Hutton & Co., Inc., appeal docketed, No. 85-3352 (11th Cir. Dec. 29, 1985) (request for rehearing in banc granted) (§ 10(b) issue).

> trate, therein electing the arbitration tribunal. In the event the undersigned [customer] does not make such a designation within five (5) days of such demand or notice, then the undersigned [customer] authorizes you to do so on behalf of the undersigned [customer].

Joint Appendix (*Jacobson v. Merrill Lynch*) at 292. All the plaintiffs incurred losses in investment accounts covered by similar arbitration agreements, and all the plaintiffs instituted suits claiming that those losses resulted from violations of federal securities laws, state statutory and common laws, and various securities-industry rules. In all five cases the district courts on the authority of *Dean Witter Reynolds, Inc. v. Byrd,* 105 S.Ct. 1238 (1985), granted motions to compel arbitration of the state law claims. No appeal challenges those orders. In *Blumenthal,* No. 85-5552, the district court refused to order arbitration of the RICO claim, while in *Jacobson,* Nos. 85-3282, 85-3311, and 85-3343, the district court ordered arbitration of the RICO claim. Claims predicated upon securities-industry rules[3] have been dismissed and are not before us. Before considering the substantive legal issues presented by these appeals, a preliminary question concerning the coverage of the arbitration agreements must be dealt with. In one of the five cases, *Gant,* No. 85-5439, the plaintiff argues that the broker amended the arbitration agreement to exclude claims arising under federal securities laws. The plaintiff contends, therefore, that because the arbitration agreement does not cover federal securities claims she is free to bring her suit in federal court. The logic of plaintiff's argument, however, is flawed.

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[3]These claims should be distinguished from claims of violations of rules of the Securities and Exchange Commission. The latter claims were treated as section 10(b) claims.

Effective December 28, 1983 the Securities and Exchange Commission (SEC) promulgated a regulation making it a "fraudulent, manipulative or deceptive act" for a broker "to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws. . . ." 17 C.F.R. § 240.15c2-2(a) (1985). This regulation goes on to mandate that for agreements entered into prior to December 28, 1983, the broker is required to send a notice "no later than December 31, 1984" informing customers that the arbitration agreements they executed do not cover federal securities laws. *Id.* at § 240.15c2-2(c).

All the arbitration agreements involved in these five appeals were executed prior to December 28, 1983. Consequently, in at least one situation, the broker, Kidder, Peabody & Co., sent a notice informing the plaintiff that the arbitration agreement did not cover federal securities laws claims. In the case in which the plaintiff raises this issue, the notice was not received until after the complained of federal securities laws violations occurred. At best, therefore, the notice acted as an amendment at the time plaintiff's account was next traded following receipt of the notice. Hence, even if the notice constituted an amendment, it does not affect any of the claims before us.

II.

In *Wilko v. Swan*, 346 U.S. 427 (1953), the Supreme Court, relying on the anti-waiver provision in section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, held that a claim for damages for violation of section 12(2) of that act, 15 U.S.C. § 77*l*(2), was not subject to contract arbitration. This court, in *Ayers v. Merrill Lynch, Pierce, Fenner & Smith*, 538 F.2d 532 (3d Cir. 1976), applied the *Wilko* rule to claims for damages for violation of section

10(b) of the Securities and Exchange Act of 1934. Relying on the similar anti-waiver provision in section 29(a) of the 1934 Act, 15 U.S.C. § 78cc(a), and on Congress' acceptance of the view that the *Wilko* rule applied to claims under the 1934 Act, this court expressly rejected the contention that *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974) should be read as confining *Wilko* to claims under the 1933 Act. *Ayers*, 538 F.2d at 536-37.

The *Ayers* opinion, which is consistent with this court's earlier discussion of the same issue in *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 245-46 (3d Cir. 1968) (dicta),[4] binds this panel unless we can conclude that it has been overruled by subsequent Supreme Court cases. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, chapter 8, section C. The brokerage firms rely on two Supreme Court cases that they contend accomplished that result. The first is *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985), which held that state law claims pleaded in a federal forum as pendent to claims under section 10(b) are arbitrable. The reasoning of that opinion, according to the brokerage firms, casts doubt upon *Ayers*. We disagree. In *Byrd* the Court took note of the line of cases in the lower federal courts applying the *Wilko* rule to section 10(b) claims and expressly declined to resolve the applicability of *Wilko* to section 10(b) claims, 105 S.Ct. at 1240 n. 1. In the face of this express disclaimer the opinion cannot fairly be read as casting any doubt upon the continued authority of *Ayers* as precedent in this circuit.

The second case on which the brokerage firms rely is *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

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[4] *See also Barrowclough v. Kidder, Peabody & Co.*, 753 F.2d 922, 940 n. 17 (3d Cir. 1985).

105 S.Ct. 3346 (1985). *Mitsubishi* held that an antitrust claim by an automobile dealer against a foreign automobile manufacturer was arbitrable. 105 S.Ct. at 3360-61. The Court in *Mitsubishi* rejected, as a rule of construction for arbitration agreements, the proposition that such clauses are inapplicable to federal statutory claims unless such claims are mentioned expressly. *Id.* at 3354-55. The issue presented in *Mitsubishi* was entirely different from that presented in *Ayers* and in *Wilko*. *Ayers* and *Wilko* did not involve interpretations of arbitration agreements; rather they involved interpretations of federal statutes that prohibit the application of forum-selection clauses. As Justice Blackmun carefully noted, "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors*, 105 S. Ct. at 3355. The *Ayers* court identified section 29(a) of the 1934 Act as such a statute, and *Mitsubishi* does not undercut that statutory interpretation.

Because no subsequent Supreme Court decision may fairly be construed to have overruled *Ayers*, that opinion binds this panel. An extended discussion of the reasons advanced by the brokerage firms concerning why *Wilko* should not apply to section 10(b) claims is therefore inappropriate. The district courts properly followed the *Ayers* precedent, and the orders denying motions to compel arbitration of section 10(b) claims will be affirmed in each appeal.

III.

The question whether RICO claims should be subject to arbitration is one of first impression in this court. The question is complicated by the unique structure of the RICO statute, which is aimed at "racketeering" activity,

defined in terms of other federal and state statutes. *Mitsubishi* teaches that exceptions to the general enforceability of arbitration agreements pursuant to the Federal Arbitration Act must be found, if at all, in regulatory statutes. In the case of RICO claims this involves consideration both of the RICO statute and the predicate statutes that it cross-references.

Unlike the 1933 and 1934 securities acts, RICO contains no anti-waiver provision. Moreover, the civil remedy for RICO violations has "evolv[ed] into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3287, (1985). Because the reach of the civil remedy has been achieved largely by the courts, it is not surprising that there is no legislative history suggesting that Congress ever considered whether RICO civil claims should be arbitrated. Despite the absence of a statutory provision that could be construed as a general prohibition against such arbitration, the Court of Appeals for the Second Circuit recently held that RICO claims, for reasons of public policy, are not arbitrable. *See McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 98-99 (2d Cir. 1986). Presumably the public policy reasons that the *McMahon* court had in mind included the complexity of most RICO claims, the provision in the statute for recovery of treble damages, and the need for developing the governing law on a case-by-case basis. We believe, however, that the *McMahon* court paid too little deference to the Supreme Court's decision in *Mitsubishi*. The *Mitsubishi* court concluded that "complexity should not suffice to ward off arbitration." 105 S. Ct. at 3357. The antitrust laws are every bit as complex and in need of judicial interpretation as is the RICO statute. The Clayton Act also provides for treble damages, 15 U.S.C. § 15 (1982), yet the *Mitsubishi* Court held that the availability of this remedy did not require that private antitrust claims be

deemed nonarbitrable. 105 S. Ct. at 3359. It would appear therefore that determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible.

The absence of any RICO statutory provision that would bar arbitration does not, however, resolve both of the appeals presenting RICO claims. Because of the unique structure of the RICO statute, which cross-references other predicate statutes, we must, in making the statutory interpretation required by *Wilko* and *Mitsubishi*, look to those statutes as well.

The Securities Exchange Act of 1934 contains a statute that has been definitively construed by this court to preclude arbitration of claims for violation of section 10(b). If a sufficient number of section 10(b) violations have taken place to trigger the applicability of RICO, plaintiffs will in most cases plead a RICO claim in order to take advantage of the triple damage remedy that the RICO statute affords. There is no evidence that Congress intended that the availability of RICO remedies for section 10(b) should suspend the operation of the anti-waiver provision of the Securities Exchange Act of 1934. Because the heart of the dispute still will be over whether the securities laws were violated, RICO plaintiffs relying on section 10(b) violations are, by virtue of section 29(a) of the 1934 Act, entitled to a judicial resolution of their RICO claims. Thus we will reverse the order in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 85-3282, 85-3282, and 85-3345, compelling arbitration of a RICO claim based on section 10(b) predicate acts.

We reach a different conclusion in *Blumenthal v. Dean Witter Reynolds, Inc.*, No. 85-5552, in which the complaint pleads RICO claims predicated on violations of the federal mail-fraud statute, 18 U.S.C. § 1341 (1982), and

wire-fraud statute, 18 U.S.C. § 1342 (1982), in addition to predicate act violations of section 10(b). *See* Complaint in *Blumenthal* at 13-14. The RICO claim based on section 10(b) violations is not subject to arbitration. The RICO claims predicated on mail and wire fraud, however, are arbitrable. No provision of the mail or wire fraud statutes bears any similarity to the anti-waiver provision of the 1933 and 1934 securities acts. The method of analysis required by *Wilko* and *Mitsubishi,* therefore, compels a different result. The RICO claims based on mail and wire fraud fall within the arbitration clause as written, and no federal statute prohibits application of the arbitration clause. The motion to compel arbitration of the RICO claims based on mail and wire fraud should have been granted.

CONCLUSION

In *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 85-3282, 85-3311, and 85-3343, we affirm the order denying the motion to compel arbitration of section 10(b) claims and reverse the order compelling arbitration of the RICO claim. In *Erlbaum v. Prudential-Bache Securities, Inc.,* No. 85-1541, we affirm the order denying the motion to compel arbitration of the section 10(b) claims. In *Gant v. Kidder Peabody & Co.,* No. 85-5439, we affirm the order denying the motion to compel arbitration of the section 10(b) claims. In *Blumenthal v. Dean Witter Reynolds, Inc.* No. 85-5552, we affirm the portion of the order denying arbitration of the section 10(b) claims and the portion of the order denying arbitration of the RICO claim based on section 10(b) violations, but we reverse the portion of the order denying arbitration of RICO claims predicated on mail and wire fraud. In *Burris v. Paine Webber, Jackson & Curtis, Inc.,* Nos. 85-5517 and 85-

5542, we affirm the order refusing to compel arbitration of the section 10(b) claims.

ADAMS, Circuit Judge, concurring in part and dissenting in part.

These appeals question whether a party may insist on arbitration, pursuant to a predispute agreement, of a claim for relief under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission or under the Racketeer Influenced and Corrupt Organizations Act (RICO). I agree with the majority's disposition of the nonstatutory issues presented in the case, and, because of controlling precedent in this Circuit, I also agree that claims asserted under § 10(b) and Rule 10b-5 are not arbitrable. However, unlike the majority, I would hold that *all* RICO actions may be submitted to arbitration pursuant to the parties' valid agreement. Because my views differ from those expressed by the majority, I write separately.

I.

The question whether Rule 10b-5, actions against brokerage firms may be submitted to arbitration pursuant to a contractual agreement necessitates an analysis of a number of statutes and judicial decisions.

An appropriate starting point is the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982), which sets forth a federal policy favoring agreements to arbitrate. Section 2 provides, in part, that so long as the contract evidences a transaction involving commerce it "shall be valid, irrevocable, and enforceable, save upon any grounds as exist at law or in equity for the revocation of any contract." Section 3 requires that the district court stay pending actions where arbitration is appropriately invoked.

Despite the Federal Arbitration Act, passed in 1925, the Supreme Court held in *Wilko v. Swan,* 346 U.S. 427 (1953), that claims for relief under the antifraud provision in § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1982), may proceed in a judicial forum regardless of any arbitration agreement between the parties. The Court reasoned that "§ 12(2) created a special right to recover for misrepresentation which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of scienter." 346 U.S. at 431. In addition, the Supreme Court noted, the 1933 Act affords plaintiffs a choice of state or federal judicial forums, a broad choice of venue, and nationwide service of process. *Id.; see* § 22(a) of the 1933 Act. 15 U.S.C. § 77v(a) (1982). Because an agreement to arbitrate waives these procedural protections, the Court asserted, it violates the 1933 Act's "non-waiver" clause:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

§ 14, 15 U.S.C. § 77n (1982).

The *Wilko* Court explained that arbitration proceedings may lessen the protection Congress aimed to provide to investors through the Securities Act. "As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact' . . . cannot be examined." 346 U.S. at 436.

Section 10(b) of the 1934 Act is similar in many respects to § 12(2) of the 1933 Act, and the 1934 statute includes a non-waiver provision virtually identical to that found in the 1933 Act and relied upon in *Wilko. See*

§ 29(a) of the 1934 Act. 15 U.S.C. § 78cc(a) (1982). Further, the 1934 Act, like the earlier statute, contains special procedural rules, including exclusive federal jurisdiction and nationwide service of process. § 27, 15 U.S.C. § 78aa (1982). Thus, it could be argued that the *Wilko* holding, when logically extended, bars compelled arbitration of suits based on Rule 10b-5.

However, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), a majority of five justices outlined a "colorable argument" that *Wilko* does not apply to Rule 10b-5 claims. *Id.* at 513. The Court stressed that unlike § 12(2), which provides an express right of action, the action based on § 10(b) and Rule 10b-5 is merely implied. In interpreting an implied cause of action, the Court suggested, a finding of congressional intent to create an exception to the Arbitration Act may not be warranted. *Id.* at 513-14. The four dissenting justices disagreed, arguing that the holding of nonarbitrability in *Wilko* required a similar result under the 1934 Act. *Id.* at 525. In any event, the majority chose not to resolve the issue, since the case at hand involved a "truly international agreement" implicating unique policies and considerations of comity. *Id.* at 515.

Despite the reservations expressed by the Supreme Court in *Scherk*, two years later this Court held that Rule 10b-5 claims are not subject to arbitration agreements. *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir. 1976), *cert. denied*, 429 U.S. 1010 (1977). Although *Ayres'* consideration of the Rule 10b-5 issue was at best an alternative basis of the result reached, the Rule 10b-5 determination subsequently has been cited in this circuit as an independent and controlling holding. *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 940 n.17 (3d Cir. 1985).

The Court in *Ayres* stated that it was not "persuaded that either the differences between the rights granted in the 1933 and 1934 Acts or any consideration of policy" warrants a distinction between the express cause of action under § 12(2) and the implied right under § 10(b). *Id.* at 536. Similarly, in other circuits there has been "an almost universal tendency in these decisions to distinguish *Scherk," Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823, 828 (10th Cir. 1978), and to follow *Wilko* in interpreting the 1934 Act except in domestic disputes.[1]

Ayres paid particular attention to Congress' apparent acquiescence in the extension of *Wilko* by lower federal courts to bar arbitration of Rule 10b-5 claims. As the Supreme Court would later make clear, the primary consideration in determining the applicability of the Arbitration Act to a statutory cause of action is the intent of Congress. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 105 S.Ct. 3346, 3355 (1985). Thus, the *Ayres* court observed that, in 1975, Congress had amended § 28(b) of the 1934 Act, 15 U.S.C. § 78bb(b) (1982), to provide that disputes between members or participants in self-regula-

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[1]*See, e.g., Conover v. Dean Witter Reynolds,* No. 85-6082 (9th Cir. July 17, 1986), *McMahon v. Shearson/American Exp., Inc.,* 788 F.2d 94 (2d Cir. 1986); *Sawyer v. raymond, James & Associates, Inc.,* 642 F.2d 791 S.C. 1980; *Mansbach v. Prescott, Ball & Turben,* 598 F.2d 1017, 1039 (6th Cir. 1979); *MLPF & S, Inc. v. Moore,* 590 F.2d 23 (Dec. 78); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 558 F.2d 831, 833-35 (7th Cir. 1977); *Sibley v. Tandy Corp.,* 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied,* 434 U.S. 824 (1977); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 538 F.2d 532, 536 (3d Cir.) *cert. denied,* 429 U.S. 1010 (1976). However, a split in the circuits has recently emerged with the Eight Circuit's opinion in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 85-5156 (8th Cir. July 11, 1986), holding an arbitration clause valid and enforceable.

tory organizations, or between municipal securities dealers and brokers, may be arbitrated. The conference committee stated: "It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan,* 346 U.S. 427 (1953), concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations." H.R. Rep. No. 229, 94th Cong., 1st Sess. 111 (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 321, 342. That the committee included this statement in amending the *1934* Act, the *Ayres* court concluded, suggests its belief that *Wilko* applies to causes of action under that Act. *See Ayres,* 538 F.2d at 537.

Whatever the merits of its reasoning, *Ayres* has not been undermined by subsequent developments. In *Dean Witter Reynolds, Inc. v. Byrd,* 105 S. Ct. 1238 (1985), the Supreme Court decided that the Arbitration Act required that state law claims pendent to nonarbitrable securities law counts be arbitrated, even if the issues overlap and even if the result is piecemeal litigation. The Court noted, but again did not decide, that whether *Wilko* applies to suits under Rule 10b-5 is unresolved, *Id.,* at 1240, n.1. Significantly, Justice White, who had joined the dissenters in *Scherk,* apparently reconsidered his views and wrote a concurring opinion reiterating the reservations expressed by the *Scherk* majority, "to emphasize that the question remains open and the contrary holdings of the lower courts must be viewed with some doubt." *Id.* at 1244. However, Justice White declined to articulate any considerations that were not expressed in *Scherk,* and therefore not presented to or examined by this Court in *Ayres.*

The other development since *Ayres* appears to be the growing judicial appreciation of and deference to arbitra-

tion as a means of alternative dispute resolution. This stance may be best discerned in a series of recent Supreme Court decisions enforcing the broad congressional mandate favoring arbitration. *See Mitsubishi, supra* (antitrust dispute arising out of international agreement is subject to arbitration); *Byrd, supra* (ordering arbitration of pendent state law claims); *Southland Corp. v. Keating,* 465 U.S. 1 (1984) (state laws undercutting the enforceability of arbitration agreements conflict with federal law and violate the Supremacy Clause); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . .").

Nevertheless, this significant trend does not undercut any of the considerations of congressional intent addressed in *Ayres.* To be sure, arbitration permits a speedy and much less expensive method of resolving many controversies than would be available in a judicial forum, and this is especially salutary in view of crowded federal dockets and exorbitantly costly litigation. But I do not doubt the power of Congress to forbid arbitration of specified statutory claims. I do doubt, however, whether Congress has in fact forbade arbitration in regard to clause asserted under § 10(b).

While the Supreme Court may later take a different view of the issues addressed in *Ayres,* stare decisis requires that any panel of this Court adhere to the undisturbed holding of a prior panel. *See Miller v. Drexel Burnham Lambert, Inc.,* No. 85-5692, slip op. at 3812 (11th Cir. June 17, 1986); *McMahon v. Shearson/American Express, Inc.,* 788 F.2d 94, 97 (2d Cir. 1986). Accordingly, although I have some reservations regarding the wisdom of nonarbitrability, I concur in the

majority's conclusion that *Ayres* dictates in this Circuit the nonarbitrability of causes of action premised on Rule 10b-5.

The issue whether a 10b-5 claim may be subject to an arbitration agreement is a close and difficult one. Neither side of the argument is without merit. It is significant, however, that as the statute requires that any arbitration provision covering a "non-arbitrable" controversy be declared void and unenforceable, 15 U.S.C. § 78cc(a) & (b), the determination that Congress intended to render nonarbitrable implied rights of action under § 10(b) would mean that courts must refuse to give force to all agreements — both pre- and post-dispute — to submit such controversies to arbitration, even after arbitration has taken place.

Given that *Barrowclough* may have incorrectly treated *Ayers* as binding authority, and in view of the doubts raised as to the continued wisdom of the *Ayers* approach in light of subsequent Supreme Court statements and the split among the circuits, it might be advisable to reconsider this important and controversial issue *in banc.* Because of the split in the circuits and the reservations in *Sherk* and *Ayers,* however, some uncertainty necessarily will remain until the Supreme Court speaks authoritatively to this issue. Since commercial relations affecting thousands of investors and scores of brokerage houses will remain in the shadow of doubt until then, an early definitive decision by the Supreme Court would be a helpful development.

II.

These appeals also present the difficult question whether RICO claims may be submitted to arbitration against a party's wishes, but in accord with a predispute agreement. Here, we are not encumbered by previous

holdings since the issue of arbitrability in RICO situations is one of first impression in this Court.

In *Mitsubishi*, the Supreme Court squarely addressed whether a federal statutory right of action may be the subject of an arbitration agreement, and held that any statutory claim may be arbitrated if congressional intent to the contrary is not evident.

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

105 S. Ct. at 3355.

As Justice Stevens observed in dissent, the Court had not previously spoken clearly on the issue, although broad language in a series of earlier cases concerning labor arbitration could be read to imply the nonarbitrability of any federal statutory claim. For example, in *McDonald v. City of West Branch*, 466 U.S. 284 (1984), the Court held that an unappealed arbitral decision pursuant to a collective bargaining agreement did not preclude a later civil rights suit under 42 U.S.C. § 1983 (1982) based on the same facts. The Court decided that "although arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." *Id.* at 290. *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (arbitration does not preclude suit under minimum wage provisions of the Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36

(1974) (right to sue under Title VII of the Civil Rights Act of 1964 is not precluded by prior arbitral decision). In *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985), this Court relied on these cases and ruled that purely statutory ERISA claims within the federal court's exclusive jurisdiction are not arbitrable. "There is an inherent incompatibility in referring to an arbitrator claims that fall within the exclusive jurisdiction of the federal courts and that arise as part of a comprehensive federal statutory scheme designed to assure protection to those individuals who fall within it." *Id.* at 940.

Mitsubishi spurned the basis proffered for this Court's decision in *Barrowclough*, stating that "we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." 105 S. Ct. at 3353. Although *Mitsubishi*, like *Scherk*, concerned an agreement to arbitrate disputes arising out of an international transaction, the *Mitsubishi* Court's rejection of a rule of nonarbitrability of statutory claims is stated in a portion of its opinion that is not confined to the context of international agreements. Thus, *Mitsubishi* would appear to limit the effect of *McDonald, Barrentine*, and *Gardner-Denver*. At most, those cases may be seen as construing the intent underlying the particular statutes at issue, or as a rule of preclusion and not of arbitrability, or perhaps as a special presumption against labor arbitrators because of their limited expertise. *See Alexander*, 415 U.S. at 57 ("the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.").

Given that even a statutory cause of action is subject to the Arbitration Act, our task is to examine the text and legislative history of the RICO statute for any congressional intent to preclude arbitration of that private right of action. This search reveals no indication that Congress

intended to exempt RICO actions from the provisions of the Arbitration Act. Further, none of the special statutory features that motivated the *Wilko* and *Ayres* decisions are found in the RICO statute. RICO has no non-waiver provision; indeed, even though it creates a private right of action it affords few procedural protections that would be waived by an agreement to arbitrate.[2] Not only is the statute silent on the arbitration issue, but the legislative history offers no indication that Congress intended to bar arbitration of private RICO actions.

Accordingly, those seeking to avoid arbitration of RICO claims rely primarily on considerations of public policy. They insist that arbitrators, whose decisions are not subject to thorough review, should not be responsible for devloping this evolving area of law, and that RICO embodies vital federal policies which should be litigated in a judicial forum. Relying on these arguments, the Second Circuit recently ruled that agreements to arbitrate RICO claims are unenforceable. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 98 (2d Cir.1986).[3] The Second Circuit rested its view on *Ameri-*

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[2]For example, the statute provides for federal jurisdiction over private claims, but does not specify whether such jurisdiction is exclusive. The courts that have addressed the issue are divided on the question. *Compare Chas. Kurz Co. v. Lombardi*, 595 F. Supp. 373, 381 n. 11 (E.D.Pa. 1984) (concurrent) *with Kinsey v. Nestor Exploration Ltd.—1981A.* 604 F. Supp. 1365, 1370-71 (E.D.Wash. 1986) (exclusive). *Cf. Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (where statute is silent, presumption favors concurrent jurisdiction).

[3]The Fifth Circuit also reached the conclusion that RICO claims are nonarbitrable, but later vacated that ruling so that the district court could consider the applicability of *Mitsubishi* to the issue. *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1281 (5th Cir.1986), *vacated in part*, No. 85-1310 (5th Cir. May 13, 1986) (per curiam).

can Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir.1968), in which it had held that actions under the Sherman Act are not arbitrable.

In *Mitsubishi*, the Supreme Court declined to accept the *American Safety* rule as applied to antitrust disputes arising out of international agreements. And although, as *McMahon* observes, the Court carefully limited its holding to the international context, *see* 105 S.Ct. at 3355, its reasoning casts grave doubt on the Second Circuit's broad conception of "the inappropriateness of the United States Arbitration Act when strong public policy considerations are involved." *McMahon*, 788 F.2d at 98.

The notion that judicially decreed public policy determines the arbitrability of particular disputes is inconsistent with the Supreme Court's instruction that only the congressional intent expressed in a statute or its legislative history is relevant to the issue. Second, the *Mitsubishi* Court itself "confess[ed] to some skepticism of certain aspects of the *American Safety* doctrine." 105 S.Ct. at 3357. In particular, it rejected the notion that where a statute implicates important public policy a judicial forum is required. Justice Blackmun wrote: "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 3358-59.

It seems clear, therefore, that public policy considerations do not compel the nonarbitrability of RICO claims. To this extent, the majority and I agree. We part company, however, over the notion that the arbitrability of RICO actions turns on the nature of the predicate offenses underlying such actions.

The majority appears to base its position primarily on its concern over the effect of a contrary holding: that Rule

10b-5 claims would not be arbitrable pursuant to the rule of *Ayres*, while a RICO claim predicated on an identical Rule 10b-5 violation may be submitted to arbitration. In stating that this result is unwarranted, the majority declares: "There is no evidence that Congress intended that the availability of RICO remedies for section 10(b) should suspend the operation of the anti-waiver provision of the Securities Exchange Act of 1934." Majority Typescript at 17.

This reasoning, I believe, misconceives the appropriate inquiry. The focus must be on whether in enacting a law Congress intended to prevent waiver of the right to a judicial forum; *lack of evidence* that Congress intended to allow arbitration is insufficient to defeat the strong presumption in favor of arbitration set forth in the Arbitration Act. "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 105 S.Ct. at 3355. Further, I do not agree that an action under RICO must be treated for purposes of arbitrability as an action under the securities laws whenever it is based upon a predicate offense that violates Rule 10b-5, as the majority's statement above would suggest. A private right of action under RICO is a unique and separate claim to which the Arbitration Act logically applies. RICO is a manifestation of congressional concern with the special harm caused by those who engage in a pattern of wrongful offenses, and the private right of action under the RICO statute is distinct from one based on an underlying offense alone.

The structure of the legislation illustrates the distinction. The statute provides a lengthy list of predicate offenses, ranging from broadly described state criminal offenses such as "gambling" and "robbery" to numerous

federal criminal, bankruptcy, and securities law provisions. *See* 18 U.S.C. § 1961(1) (1982). It then proscribes, in part, the operation of any enterprise engaged in or whose activities affect interstate or foreign commerce, using income derived from a "pattern of racketeering activity," *id.* at § 1962, defined as the commission of at least two predicate offenses within a ten-year period, *id.* at § 1961(5). Further, an individual may maintain a private claim for injuries suffered as a result of such racketeering activity. *Id.* at § 1964(c).

Given the clear distinction between the nature of a RICO violation and any particular predicate offense, the congressional intent in passing the Securities Exchange Act would not appear to be relevant in an inquiry into the legislative purpose animating RICO. And, focusing solely on the latter inquiry, as noted earlier there is simply no indication that Congress intended to foreclose application of the Arbitration Act to RICO claims.

To be sure, the position that all RICO claims are arbitrable, regardless of the predicate offenses averred, would lead to piecemeal litigation. Where a pre-dispute agreement to arbitrate had been entered into, a RICO claim based on Rule 10b-5 violations would proceed in an arbitral forum, while a securities claim based upon similar facts would be litigated in federal court. The issue of what preclusive effect, if any, should be accorded either decision is not before us.

While this may not be an optimum use of adjudicative resources, it is the inevitable result where Congress specifies the nonarbitrability of a few statutory provisions and applies the sweeping Arbitration Act to all others. It is also consistent with the Supreme Court's action in *Byrd*, where it adhered to the Act's mandate and ordered the arbitration of pendent state law claims, while a Rule 10b-5 action concerning the same transactions and alleged

wrongs continued in federal court. As the Supreme Court stated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983): "[F]ederal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20 (emphasis in original). Should Congress desire a different result, it, of course, may so legislate.

In contrast to the result I advocate, the majority's approach not only bifurcates the proceedings, but also compels an unwarranted division of a plaintiff's single RICO claim. It suggests that where a RICO count is predicated on arbitrable and nonarbitrable offenses the RICO claim itself will be split and heard in separate proceedings. Thus, in *Blumenthal v. Dean Witter Reynolds, Inc.*, No. 85-5552, where plaintiff's complaint stated only a single count based on RICO, the ruling by the majority would divide that count in order to allow for arbitration of the mail and wire fraud issues and litigation in a court of the securities issues — despite the fact that the unique RICO offense depends, in this case, on whether the enterprise has engaged in mail and wire fraud *as well* as securities fraud within a ten-year period.

In my view, the position reached by the majority today fails to take note of the unique nature of a RICO violation, and the broad directive set forth in the Arbitration Act.

III.

Accordingly, while I concur in the decision regarding the nonarbitrability of Rule 10b-5 claims, primarily because of prior holdings of this Court, and the arbitrability in general of RICO claims, I respectfully dissent to the extent the majority in *Blumenthal* and in *Jacobson v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* Nos. 85-3282, 85-3311 and 85-3343, forbids the arbitration of RICO claims that are predicated on Rule 10b-5 violations.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

ORDER

ORDER FILED JULY 19, 1985

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION NO.
84-4799(F)

HERBERT BLUMENTHAL,

Plaintiff,

against

DEAN WITTER REYNOLDS, INC.
and DANIEL J. TUROV,

Defendants.

The matter being opened to the Court by John V. McCambley, Esq. attorney for defendant Dean Witter Reynolds, Inc., and MacFall, Reidl & Miskowski and Labozzetta & Hass, attorneys for defendant Daniel J. Turov, on notice to Phillips, Nizer, Benjamin, Krim & Ballon and Lewis & McKenna, attorneys for plaintiff Herbert Blumenthal, pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint, and, on behalf of defendant Dean Witter Reynolds, Inc., in the alternative to stay this action and direct plaintiff to proceed in arbitration, and the Court having considered the arguments of counsel and due deliberation having been given the matter

It is this 19th day of July, 1985

ORDERED that

(1) defendants' motions to dismiss the Complaint are denied; and

(2) plaintiff is directed to proceed with arbitration respecting the Third and Fourth Counts of the Complaint, and the First and Second Counts of the Complaint are stayed pending said arbitration.

CLARKSON S. FISHER, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 84-4799

OPINION FILED JULY 3, 1985

NOT FOR PUBLICATION

HERBERT BLUMENTHAL,
Plaintiff,

v.

DEAN WITTER REYNOLDS, INC. ET AL.,
Defendants.

FISHER, Chief Judge.

On November 20, 1984, Herbert Blumenthal filed a four-count complaint and jury demand against Dean Witter Reynolds, Inc. (Dean Witter), a securities broker and dealer, and Daniel J. Turov, an officer and employee of Dean Witter Reynolds. The first Count alleges violations of sections 10(b) and 20 of the Securities Exchange Act of 1934, as well as rule 10b-5 promulgated thereunder. 15 U.S.C. §§ 78j(b), 78t; 17 C.F.R. § 240.10b-5. The Second Count alleges a RICO violation. 18 U.S.C. §§ 1962(c), 1964(c). Claiming that this court has pendent jurisdiction, plaintiff has alleged common-law fraud in the Third Count and violation of N.Y. General Business Law § 349(a) in the Fourth Count.

Defendant Dean Witter has filed a motion to dismiss the entire complaint and, in the alternative, to stay this action and order plaintiff to arbitrate his claims before the New York Stock Exchange Board of Directors. Defendant Turov has filed a motion to dismiss only the Second Count of the complaint. the RICO action. For the reasons set forth below, defendants' motions to dismiss all or any part of plaintiff's complaint are denied, but the First and

Second Counts of the complaint are stayed. Plaintiff is directed to proceed with arbitration respecting the Third and Fourth Counts.

Although this case appears to be a complex piece of litigation, a summary of the facts, viewed in a light favorable to plaintiff, may be set forth with relative ease. In the spring of 1982 at Mr. Turov's request, plaintiff opened a securities account at Dean Witter. At all times, Blumenthal emphasized that "he required a policy of strictly conservative investments because he was then fifty-nine years of age, planning to retire, and in the midst of bitterly contested matrimonial proceedings which threated severely to deplete his limited financial resources." Plaintiff's Complaint at ¶ 10. While Blumenthal stated that he was an unsophisticated investor, Turov held himself out as an investment expert fully capable of serving Blumenthal's investment needs. Blumenthal has conceded that Turov served adequately Blumenthal's strictly conservative investment needs for approximately one year.

In early July 1983, Turov telephoned Blumenthal late in the evening and "strongly advised [plaintiff] to purchase depositary units and warrants of Apache Petroleum Company . . ." Plaintiff's Complaint at ¶ 14. When plaintiff stated that he was unfamiliar with these kinds of investments, Turov assured him that these investments were consistent with plaintiff's investment needs. Based on Turov's representations, Blumenthal, who did not understand this investment strategy, authorized the purchase. The same sort of event transpired in October 1983; Turov called Blumenthal at home late in the evening and, utilizing "pressure tactics," induced Blumenthal to purchase additional Apache warrants. At this time, Turov failed to advise Blumenthal "of the price or other terms of the proposed purchase." Plaintiff's Complaint at ¶ 17. To

exacerbate the situation, plaintiff has alleged that in October 1983, Turov virtually liquidated plaintiff's entire cash and securities portfolio, invested all of the proceeds in Apache warrants, purchased these warrants on margin, and utilized plaintiff's full margin limits to effect the purchases.

Turov, and Dean Witter because Turov's acts were within the scope of his employment and "whereby his acts are the acts of [Dean Witter]," Plaintiff's Complaint at ¶ 26, violated the law because Turov failed to advise plaintiff that the Apache warrants constituted a highly speculative investment inconsistent with plaintiff's investment needs, although Turov was aware of this material fact. In addition, Turov failed to inform plaintiff that Dean Witter was a major underwriter of Apache securities and had conflicting interests in recommending this investment. Furthermore, Turov never informed plaintiff that Dow Chemical Company held a significant number of Apache warrants. This constituted a material misrepresentation or omission because new investors of Apache securities faced the risk that their investments could be affected adversely by Dow Chemical transactions. Needless to say, plaintiff lost a significant amount of money due to this investment.

Under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder, it is unlawful for any person to use or employ a deceptive or manipulative device, make an untrue statement about a material fact, omit a material fact, and engage in any practice that operates or would operate as a fraud or deceit upon a person in connection with the sale of a security. To make out a cause of action under the aforementioned securities laws, plaintiff must allege misrepresentation or omission of a material fact, reliance, "scienter," causation, and damages, *See Ernst & Ernst v.*

Hochfelder, 425 U.S. 185, 197, 206, *reh'g denied,* 425 U.S. 986 (1976); *Seiler v. E.F. Hutton & Co.,* 584 F. Supp. 607, 611 (D.N.J. 1984).

Plaintiff has alleged misrepresentation of a material fact. The complaint is replete with references to plaintiff's admission that he was an unsophisticated investor seeking strictly conservative investments, and that Turov represented that "he could and would recommend only conservative, low risk investments consistent with plaintiff's objectives." Plaintiff's Complaint at ¶ 10. Mr. Turov, however, invested plaintiff's money in speculative securities after representing to plaintiff that the Apache securities were safe and consistent with plaintiff's investment objectives. Although defendant Dean Witter has questioned the materiality of the fact it was the underwriter, and that Dow Chemical held a significant number of Apache warrants, those allegations may be relevant in a securities-fraud action. See *Monsen v. Consol. Dressed Beef Co.,* 579 F.2d 793, 802-03 (3d Cir.), *cert. denied,* 439 U.S. 930 (1978); *Seiler v. E.F. Hutton & Co.,* 584 F. Supp. at 611; *Redstone v. Goldman, Sachs & Co.,* 583 F. Supp. 74, 76 (D. Mass. 1984); *Yancoski v. E.F. Hutton & Co.,* 581 F. Supp. 88, 92 (E.D. Pa. 1983).

Plaintiff also has satisfied the materiality requirement for a private action under section 10(b) and rule 10b-5 of the 1934 Act. Mr. Blumenthal emphasized how important it was to him that low-risk, conservative investments be made, and was unaware of the extent to which the Apache warrants were purchased on margin and that virtually his entire portfolio would be liquidated. Plaintiff has alleged that Turov invested in highly speculative securities and failed to advise plaintiff not only that the warrants would be purchased on margin, but also that his portfolio would be liquidated. What plaintiff has alleged Turov misrepresented or omitted is material because those facts most

assuredly would have altered the "total mix" of information available to plaintiff as an investor, and those facts would have been considered important by plaintiff. *See TSC Industries v. Northway, Inc.,* 426 U.S. 438, 449 (1976); *Goldberg v. Meridor,* 567 F.2d 209, 218-19 (2d Cir. 1977), *cert. denied,* 434 U.S. 1069 (1978); *Dower v. Mosser Industries,* 488 F. Supp. 1328, 1334 (E.D. Pa. 1980), *aff'd,* 648 F.2d 183 (3d Cir. 1981).

In order to recover in this case, plaintiff must show that defendants acted with "scienter." Defendant Dean Witter's argument notwithstanding, plaintiff has alleged more than the mere fact that defendants engaged in unsuitable trading of securities. A necessary element of a section 10(b) claim, "scienter" refers to a mental state in which a defendant intends to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder,* 425 U.S. at 193-94. The Third Circuit has defined scienter to include "recklessness," which may be applied to misstatements as well as to omissions. *McLean v. Alexander,* 599 F.2d 1190, 1197-98 (3d Cir. 1979); *Seiler v. E.F. Hutton & Co.,* 584 F. Supp. at 611. Plaintiff's complaint states in relevant part that

> [o]n information and belief, Turov knew prior to recommending and purchasing Apache units and warrants for plaintiff's account that such investment was highly speculative and completely inconsistent with plaintiff's investment objectives but intentionally misrepresented the appropriateness of the proposed transactions and willfully concealed significant and material information concerning said transactions including his intent to liquidate plaintiff's account and even to purchase Apache warrants on margin, and the interest of DWR in such transactions by virtue of its relationship to Apache as one of its major underwriters . . .

Plaintiff's Complaint at ¶ 21.

Plaintiff's allegations, if proven, would show that Turov intended to deceive, manipulate, or defraud plaintiff, or that his conduct involved an extreme departure from standards of ordinary care that presented a danger of misleading buyers and sellers that was known to defendant or was so obvious that he must have been aware of it. *McLean v. Alexander,* 599 F.2d at 1197-98; *Dower v. Mosser Industries,* 488 F. Supp. at 1335-36. Thus, plaintiff's allegations satisfy the scienter requirement of a section 10(b) action. In addition, plaintiff has specifically alleged that he relied on defendant Turov's representations and assurances and that he suffered at least $150,000 in damages due in large part to the "precipitous decline" in value of the speculative Apache securities.

As the discussion above demonstrates, plaintiff, despite defendant Dean Witter's contention that the complaint consists mainly of "self-serving statements and conclusory allegations" (Defendant Dean Witter's Brief in Support of Motion to Dismiss at 9-10), has pleaded fraud with particularity in accordance with Fed. R. Civ. P. 9(b). The complaint states that Turov was aware of Blumenthal's investment needs and alleges that at certain times and places Turov met or spoke with plaintiff, made certain statements and failed to disclose information, liquidated plaintiff's account without his permission, and invested the proceeds in Apache warrants. This court concludes that plaintiff has pleaded the circumstances of the alleged fraud adequately for purposes of satisfying Fed. R. Civ. P. 9(b). The allegations in the complaint are specific enough to give notice and enable defendants to defend. *See Sevile Indus. Machinery v. Southmost Machinery,* 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S. Ct. 1179 (1985).

The First Count of the complaint, alleging securities fraud, survives defendant Dean Witter's motion to dismiss. As the Third and Fourth Counts, alleging common-law fraud and a violation of N.Y. General Business Law § 349(a), arise from the same nucleus of facts out of which the federal securities claims arise, this court will deny defendant Dean Witter's motion to dismiss the Third and Fourth Counts for lack of pendent jurisdiction. *See Mine Workers v. Gibbs,* 383 U.S. 715, 725-26 (1966).

Defendants have moved to dismiss the Second Count of the complaint — the RICO count — for failure to allege sufficient predicate acts required to state a RICO claim. *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482, 495-96 (2d Cir. 1984), *cert. granted,* ____U.S. ____, 105 S. Ct. 901 (1985) (No. 84-648). Shortly after the Second Circuit decided *Sedima,* the Seventh Circuit expressed a contrary view — that a civil RICO plaintiff need not allege a prior conviction or an injury to business or property resulting from the underlying acts of racketeering. *Haroco v. American National B & T Co. of Chicago,* 747 F.2d 384, 387-98 (7th Cir. 1984), *cert. granted,* ____ U.S. ____, 105 S. Ct. 902 (1985) (No. 84-822). District courts in the Third Circuit have split on the above issue, *see In re Catanella and E.F. Hutton and Co.,* 583 F. Supp. 1388, 1427 (E.D. Pa. 1984), but the Third Circuit has not ruled on this issue. The United States Supreme Court heard argument in *Sedima* and *Haroco* together on April 17, 1985. 105 S. Ct. at 901-02; 53 U.S.L.W. 3751 (U.S. Apr. 23, 1985) (Nos. 84-848, 84-822).

In *B.F. Hirsch v. Enright Refining Co.,* 751 F.2d 628, 633-34 (3d Cir. 1984), however, the Third Circuit remanded to the district court for further proceedings on civil RICO claims in a case in which prior convictions were not pleaded. Although the court did not rule on whether prior convictions must be pleaded, it may be

argued that the court accepted the view that a prior conviction is not necessary in order to maintain a civil RICO action. Given the Third Circuit's decision in *Seville Indus. Machinery v. Southmost Machinery,* 742 F.2d at 789-92, that a liberal approach should be accorded RICO pleadings with respect to a motion to dismiss, this court will deny defendants' motions to dismiss the Second Count of plaintiff's complaint.

Defendant Dean Witter has asked this court in the alternative to refer the entire controversy to arbitration. After defendants' motions to dismiss were filed, but before oral argument was heard, the United States Supreme Court decided *Dean Witter Reynolds Inc. v. Byrd,* ____ U.S. ____, 105 S. Ct. 1238 (1985). In *Byrd,* the Court ruled that when a complaint raises both federal securities claims and state-law claims, a federal district court may not deny a motion to compel arbitration of the state-law claims if the parties agreed to arbitrate their disputes. *Id.* at 1239, 1242. The court reasoned that even though inefficient piecemeal litigation may result if some claims proceed to arbitration while others remain before the trial court, a result that the "doctrine of intertwining" avoided, the stronger policy consideration, expressed in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.,* is "to enforce private agreements into which parties had entered." 105 S. Ct. at 1240-43.

In this case, as indicated in the account contract entered into between plaintiff and defendants, the parties agreed to submit "[a]ny controversy . . . arising out of or relating to this contract or the breach thereof . . . [to] arbitration." Thus, in light of *Byrd,* this court is obligated to compel arbitration of the state-law claims; in asking this court at oral argument to proceed to discovery on the securities fraud and civil RICO counts of the complaint, plaintiff's counsel arguably conceded that *Byrd* requires

this court to enter an order compelling arbitration of the state-law counts of the complaint. *See* Page, *Arbitrability, A New Look,* N.Y.L.J., Apr. 22, 1985, at 1-2, 15.

The complaint in *Byrd* alleged securities fraud violations under the Securities Exchange Act of 1934 as well as state-law violations. 105 S. Ct. at 1239. Dean Witter did not seek to compel arbitration of the 1934 Act securities fraud violations at the trial level, and the Court refused to consider this question. *Id.* at 1240 n.1. In the first footnote, however, the Court acknowledged that, while an agreement to arbitrate claims arising under section 12(2) of the Securities Act of 1933 was not enforceable because of an anti-waiver provision in section 14 of that Act, *Wilko v. Swan,* 346 U.S. 427, 428, 434-35 (1953), it was unclear whether the holding in *Wilko* applied to claims arising under section 10(b) of the 1934 Act. *See Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 513-14, *reh'g denied,* 419 U.S. 885 (1974). In addition, although the Court pointed out that it did not hold in *Scherk* that *Wilko* would not apply in a section 10(b) 1934 Act claim, other than in the case of an international commercial transaction, Justice White, in his concurring opinion, suggested that a section 10(b) and rule 10b-5 1934 Act claim, an implied rather than express right of action, ought to be subject to the parties' arbitration agreement. *Dean Witter Reynolds Inc. v. Byrd,* 105 S. Ct. at 1240 n.1, 1244.

In *Ayres v. Merrill Lynch, Pierce, Fenner & Smith,* 538 F.2d 532, 536-37 (3d Cir.), *cert. deined,* 429 U.S. 1010 (1976), a Third Circuit case decided after both *Wilko* and *Scherk,* the court rejected defendant's argument that *Wilko* should not be extended to arbitration of a section 10(b) 1934 Act claim. Rather, the Third Circuit held "[w]e are not, however, persuaded that either the differences between the rights granted in the 1933 and 1934

Acts or any consideration of policy warrant such a distinction." *Ayres v. Merrill Lynch, Pierce, Fenner & Smith,* 538 F.2d at 536 (footnote omitted); *accord Moran v. Paine, Webber, Jackson & Curtis,* 389 F.2d 242, 245 (3d Cir. 1968). Although Justice White stated "the question [whether a section 10(b) 1934 Act claim is subject to an agreement to arbitrate] remains open and the contrary holdings of the lower courts must be viewed with some doubt," the Court noted that "*Wilko* has retained considerable vitality in the lower federal courts. Indeed, numerous District Courts and Courts of Appeals have held that the *Wilko* analysis applies to claims arising under § 10(b) of the Securities Exchange Act of 1934 . . . and that agreements to arbitrate are therefore unenforceable." *Dean Witter Reynolds Inc. v. Byrd,* 105 S. Ct. at 1240 n.1, 1244.

Despite Justice White's apparent invitation to courts to compel arbitration of the section 10(b) 1934 Act claim, neither the United States Supreme Court nor the Court of Appeals for the Third Circuit has adopted this approach, and in *Ayres v. Merrill Lynch, Pierce, Fenner & Smith,* 538 F.2d at 536-37, the Third Circuit considered and rejected the approach. It is not this court's obligation or prerogative to depart from the law as enunciated by the Supreme Court and the Third Circuit. Even if the last rites have been administered in *Scherk* and Justice White's concurring opinion in *Byrd,* the proposition of law that a section 10(b) 1934 Act claim is not arbitrable has not yet been declared dead, and this court is not privileged to administer the *coup de grace. See Pearce v. N.J. Highway Authority,* 122 N.J. Super. 342, 345 (App. Div. 1973).[1] Thus, that

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[1]In fact, in November 1983, the Securities and Exchange Commission, pursuant to the Securities Exchange Act of 1934, promulgated a rule that prohibits the use of predispute arbitration agreements that compel investors to arbitrate federal securities claims. 17 C.F.R. § 240.15c2-2; *see* Note, *The Severability of Arbitrable and Nonarbitra-*

part of defendant Dean Witter's motion seeking an order compelling arbitration of the section 10(b) 1934 Act securities fraud claim is denied.

There does not appear to be a published decision in the Third Circuit respecting the issue of whether a civil RICO claim is arbitrable; however, other federal courts that have considered the issue have held that RICO claims are not arbitrable. *Universal Marine Ins. Co. v. Beacon Ins.*

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ble Securities Claims, 41 Wash. & Lee L. Rev. 1165, 1166 (1984). With respect to arbitration agreements entered into prior to December 28, 1983, if a broker or dealer has after July 1, 1983, "(i) carried a free credit balance, or (ii) held securities for safekeeping or as collateral, or (iii) effected a securities transaction" for a customer, then the customer must be informed in writing no later than December 31, 1984, that the arbitration agreement is not binding with respect to federal securities claims. 17 C.F.R. § 240.15c2-2(b) & (c)(1).

The crux of plaintiff's complaint concerns securities transactions effected after July 1, 1983, and from an examination of the "Securities Account Agreement" entered into between the parties on November 24, 1982, it appears that defendants may also have carried a free credit balance and held securities for safekeeping or as collateral on behalf of plaintiff after July 1, 1983. Thus, plaintiff should have received in writing no later than December 31, 1984, a statement that, despite the parties' arbitration agreement, plaintiff is "not required to arbitrate any dispute or controversy that arises under the federal securities law but instead can resolve any such dispute or controversy through litigation in the courts." *Id.*

As noted above, the United States Supreme Court in *Byrd* declined to resolve, on the grounds that the issue was not properly before it, "the applicability of *Wilko* to claims under § 10(b) and Rule 10b-5." *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. at 1240 n.1. Moreover, the activities that formed the basis of the complaint in *Byrd* occurred between September 1981 and March 1982, so that 17 C.F.R. § 240.15c2-2 was not applicable to that case. 105 S. Ct. at 1239. Nevertheless, it appears that this rule, not addressed by Justice White in his concurring opinion in *Byrd*, or by the parties in this case, cuts against Justice White's invitation to compel arbitration of the section 10(b) 1934 Act securities fraud claim.

Co., 588 F. Supp. 735, 738 (W.D.N.C. 1984), *appeal argued,* No. 84-1358 (4th Cir. Feb. 6, 1985);[2] *Wilcox v. Ho-Wing Sit,* 586 F. Supp. 561, 567 (N.D. Cal. 1984); *S.A. Mineracao Da Trinadade-Samitri v. Utah Intern.,* 576 F. Supp. 566, 574-76 (S.D.N.Y. 1983), *aff'd,* 745 F.2d 190, 196-97 (2d Cir. 1984). In *S.A. Mineracao Da Trindade-Samitri v. Utah Intern.,* plaintiff brought suit alleging contract, fraud, securities, and civil RICO claims, and defendant moved for a stay of the complaint and to compel arbitration pursuant to the parties' agreement to arbitrate. 576 F. Supp. at 567-69. The trial court ordered all of the claims arbitrable except the RICO claims, which the judge stayed pending arbitration of the rest of the action. *Id.* at 569-76.

While recognizing the public policy favoring enforcement of an arbitration clause to which the parties have agreed, the trial judge found even more compelling "the important public interest in the enforcement of RICO, which may make arbitration an inappropriate method for resolving RICO claims." 576 F. Supp. at 574. The court explained that as is the case with antitrust laws, enforcement of RICO "involves concerns touching upon vital national interests.... more significant than the public interest considerations involved in the enforcement of ordinary securities fraud claims...." *Id.* at 575-576. Given the impact resolution of RICO claims brought by private individuals will have on society at large, the trial judge inferred "that Congress did not intend to entrust the enforcement of such laws to arbitrators...." *Id.* at 575. Thus, the trial judge held that the RICO claims were

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[2]On April 25, 1985, pursuant to an inquiry, this court was notified by the office of the clerk for the Fourth Circuit that the issue of the arbitrability of the RICO claim has not been raised on appeal.

not arbitrable, and ordered the RICO claims stayed pending arbitration of the arbitrable claims. *Id.* at 575-576.[3]

Trial judges both in the Western district of North Carolina and in the Northern District of California found the reasoning underlying the district judge's decision respecting the arbitrability of RICO claims in *S.A. Mineracao Da Trindade-Samitri v. Utah Intern.* to be sound. *Universal Marine Ins. Co. v. Beacon Ins. Co.,* 588 F. Supp. at 738; *Wilcox v. Ho-Wing Sit,* 586 F. Supp. at 567. This court agrees with the results reached in the aforementioned cases. The resolution of RICO claims, even though brought by individual plaintiffs, will have an impact on society at large, and the public has significant interest in the enforcement of RICO. Additionally. as observed by the court in *Wilcox v. Ho-Wing Sit,* 586 F. Supp. at 567, "the RICO statute is sufficiently embryonic that its development would seem better left to courts than to arbitrators." Thus, this court holds that plaintiff's RICO claim is not arbitrable.

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[3]The trial judge addressed two other issues in his opinion. First, he held that the parties' agreements to arbitrate were broad enough to include a claim of fraud in the inducement of the actual agreements to arbitrate. *S.A. Mineracao Da Trindade-Samitri v. Utah Intern.,* 576 F. Supp at 569-74. Second, the judge ruled that in accordance with *Scherk v. Alberto-Culver Co.,* 417 U.S. at 513-14, plaintiff's federal securities claims were arbitrable because they arose out of an international commercial transaction. *Id.* at 576. Thereafter, the trial judge granted plaintiff's motion, pursuant to 28 U.S.C. § 1292(b), to certify the court's opinion and order for interlocutory appeal to the Second Circuit, 579 F. Supp 1049 (S.D.N.Y. 1984), which affirmed the district judge's decision. 745 F.2d 190 (2d Cir. 1984). The thrust of the appellate court's opinion considered the question of whether claims of fraud in the inducement were arbitrable and, apparently, plaintiff did not challenge the trial judge's ruling that the RICO claims were not arbitrable. 745 F.2d at 196-97; 579 F. Supp. at 1050 n.2.

In conclusion defendant Dean Witter's motion to dismiss the First Count of plaintiff's complaint — the securities fraud claim brought under the Securities Exchange Act of 1934 — is denied. The motion by defendants Dean Witter and Truov to dismiss the Second Count of plaintiff's complaint — the RICO claim — is denied. In light of the recent Supreme Court decision in *Dean Witter Reynolds Inc. v. Byrd,* the Third and Fourth Counts of plaintiff's complaint — the common-law fraud and N.Y. General Business Law claims — , over which this court may exercise pendent jurisdiction, shall be submitted to arbitration. To this extent, defendant Dean Witter's motion for an order compelling arbitration is granted. Based on the foregoing authorities, however, that part of defendant Dean Witter's motion seeking an order compelling arbitration of the First and Second Counts of plaintiff's complaint is denied, and the 1934 Act securities-fraud and RICO claims are stayed pending arbitration of the Third and Fourth Counts of plaintiff's complaint. *See* 9 U.S.C. § 3; *Gavlik Const. Co. v. H.F. Campbell Co.,* 526 F.2d 777, 784 (3d Cir. 1975); *S.A. Mineracao Da Trindade-Samitri v. Utah Intern.,* 576 F. Supp. at 576. Plaintiff will submit an order. No costs.

July 3, 1985.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77l(2):

Any person who —

* * *

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Section 22(a), 15 U.S.C. § 77v:

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Com-

mission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 29(a), 15 U.S.C. § 78cc(a):

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Securities and Exchange Commission,

Rule 10b-5, 17 C.F.R. § 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Section 1963(b), 18 U.S.C. § 1962(b):

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1962(c), 18 U.S.C. § 1962(c):

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c), 18 U.S.C. § 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(Active Assets Account DWR Account No. 601-06053-0)

APPENDIX E

Visa® Account Application and Agreement
Bank One of Columbus, N.A.

I have executed a Dean Witter Reynolds Inc. ("DWR") Agreement governing the terms and conditions of the Active Assets Account ("AAA") financial service that is being offered by DWR. In connection therewith, I hereby apply to BANK ONE OF COLUMBUS, N.A., Columbus, Ohio ("BANK ONE"), for a Visa Account ("Visa Account") and request that checks ("Checks") be provided and that one or more Visa cards ("Card") be issued for use with my Visa Account. I understand that my application for a Visa Account is accepted by BANK ONE when a Card is issued to me and Checks are provided. I agree that by signing, using, or permitting another to use the Checks or Card, I will be bound by the following terms and conditions:

Ownership

The Card remains the property of BANK ONE and may be cancelled by BANK ONE at any time without prior notice. I agree to surrender any unused Checks and Card and to discontinue utilization of my Visa Account immediately upon the request of BANK ONE or DWR.

Account Procedures

I understand that BANK ONE will open my Visa Account in the name supplied to it by DWR, that information concerning transactions in my Visa Account or the status of such account will be furnished to me by DWR, and that billing error disputes or inquiries are to be directed to BANK ONE through DWR. I also understand

that my cancelled Checks and Card transaction receipts will not be returned to me.

Liability

I agree to assume liability for all transactions made by me, or by any authorized person, through the use of the Checks or Card in connection with my Visa Account. I also agree to pay the reasonable costs and expenses of collection of any unpaid balance due on my Visa Account, including, but not limited to, attorneys' fees to the extent allowed by law involved in such collection.

Authorization Limit

Neither I nor any person authorized to act on my behalf will incur any charge by use of the Checks or Card in excess of the amount authorized for my Visa Account ("Authorization Limit"), as established by BANK ONE based upon information furnished to it by DWR. It is understood that the Authorization Limit established for my Visa Account will be the aggregate amount of any uninvested free credit cash balance in my securities account with DWR (the "Securities Account"), the net asset value of my Trust shares and the available margin loan value of the securities in my Securities Account with DWR. All Visa Account transactions within my Authorization Limit will be paid to BANK ONE by DWR from and through my Securities Account, as provided by the AAA Agreement.

Transaction Exceeding Authorization Limit

In the event a transaction exceeds my Authorization Limit, BANK ONE may accept such transaction as an overdraft on my Visa Account which is immediately due and payable to BANK ONE, plus Finance Charges thereon. I understand that Finance Charges will be in-

curred on the Average Daily Balance of such overdraft at a periodic rate of .068493 per day (25% Annual Percentage Rate) from the date my Visa Account is overdrawn until paid in full. The Average Daily Balance is calculated by dividing the total of the outstanding daily balances of overdrafts by the number of days the Visa Account is overdrawn. Payments will be applied, as of the date of receipt by BANK ONE, first to previously billed and unpaid Finance Charges and then to the balance of overdrafts. I understand that whenever there is an overdraft in my Visa Account or any Finance Charges due, I will receive a periodic billing statement from BANK ONE which will detail any overdrafts, plus Finance Charges thereon. Finance Charges that accrue after a statement date will appear on the following billing statement.

Termination of Account

In the event of (i) cancellation of my Visa Account by BANK ONE, (ii) my insolvency or death, (iii) the institution of attachment or garnishment proceedings against me, (iv) any breach or default of this Agreement by me or any person authorized to act on my behalf, or (v) upon the termination by DWR of my AAA financial service, the Visa Account will automatically terminate without notice to me or to my representative.

Separability

If any provision of this Agreement is held to be unenforceable, such determination shall not affect the validity of the remaining provisions of the Agreement.

Applicable Law

The finance charge under this Agreement is governed by the National Banking Act and Ohio law. All other terms and conditions are governed by Ohio law except to

the extent the law of my state explicitly applies. I acknowledge receipt of a copy of this Agreement and consent to the foregoing terms and conditions.

SIGNATURES — INDIVIDUAL AND JOINT ACCOUNTS

DATE

X HERBERT BLUMENTHAL X 11/24/82

NOTICE: The Ohio laws against discrimination require that all creditors make credit equally available to all creditworthy customers, and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio Civil Rights Commission administers compliance with this law.

Securities Account Agreement Terms and Conditions

Liquidation

DWR is hereby authorized, in DWR's discretion, should I die, or should DWR for any reason whatsoever deem it necessary for the protection of DWR, to sell any or all of the securities and commodities or other property which may be in DWR's possession or which DWR may be carrying for my account (either individually or jointly with others), or to buy in any securities, commodities or other property of which my account or accounts may be short, or cancel any outstanding orders in order to close out my account or accounts in whole or in part or in order to close out any commitment made on my behalf. Such sale, purchase or cancellation may be made according to DWR's judgment and may be made, at DWR's discretion, on the exchange or other market where such business is then usually transacted, or at public auction or at private

sale, without advertising the same and without notice to me or to my personal representatives, and without prior tender, demand or call of any kind upon me or upon my personal representatives and DWR may purchase the whole or any part thereof free from any right of redemption, and I shall remain liable for any deficiency; it being understood that a prior tender, demand or call, or prior notice from DWR, of the time and place of such sale or purchase shall not be considered a waiver of DWR's right to sell or buy any securities and/or commodities and/or other property held or owed to DWR by me, at any time as provided herein.

Short Sales/Deliveries

Whenever I place with DWR any sell order for short account, I will designate it as such and I hereby authorize DWR to mark such order as being "short", and when placing any order for long account will designate it as such and hereby authorize DWR to mark such order as being "long". Any sell order which I shall designate as being for long account, as above provided, will be for securities then owned by me and, if such securities are not then deliverable by DWR from any of my accounts, the placing of such order shall constitute a representation by me that it is impracticable for me then to deliver such securities to DWR but that I will deliver them as soon as it is possible for me to do so without undue inconvenience or expense.

In case of the sale of any security, commodity, or other property at my direction and the inability of DWR to deliver the same to the purchaser by reason of my failure to supply them to DWR, I authorize DWR to borrow any security, commodity, or other property necessary to make delivery thereof and I hereby agree to be responsible for any loss which DWR may sustain thereby and any premi-

ums which DWR may be required to pay thereon, and for any loss which DWR may sustain by reason of its inability to borrow the security, commodity, or other property sold.

Communications

Communications may be sent to me at the mailing address on file with you, or at such other address as I may hereafter give in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to me personally, whether actually received or not.

Arbitration of Controversies

Any controversy between DWR and me arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as I may elect. If I do not make such election by registered mail addressed to DWR at DWR's main office within five (5) days after receipt of notification from DWR requesting such election, then I authorize DWR to make such election on my behalf. Any arbitration hereunder shall be before at lease three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

Governing Law

This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which I may open or re-open with DWR, and shall enure to the benefit of DWR's present

organization, and any successor organization, without regard to any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of DWR's present organization, and of the assigns of any successor organization, and shall be binding upon me and/or my estate, executors, administrators and assigns.

Representations

I hereby represent that I am of full age, that I am not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commercial paper. I further represent that no one except me (and, to the extent community property stands in the account or accounts, my spouse) has an interest in my account or accounts with DWR.

Acts of God

I understand that DWR shall not be liable for loss caused directly or indirectly by government restrictions, exchange or market rulings, suspension of trading, war, strikes or other conditions, commonly known as "acts of God", beyond DWR's control.

Joint Several Liability

My obligations under this agreement shall be joint and several with any other individual who signs this agreement as a joint account holder.

Headnotes

The above headnotes have been inserted solely for the purpose of convenience in description and under no cir-

cumstance shall be deemed to qualify any of the rights set forth in the provisions.

Interest Charges

I hereby acknowledge receipt of the DWR statement of interest charges.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 7, 1986, I served the within PETITION FOR A WRIT OF CERTIORARI in re: "Dean Witter Reynolds Inc. vs Herbert Blumenthal" in the United States Supreme Court, October Term 1986 No . . .

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Lewis & McKenna
By: Geoffrey Johnson, Esq.
82 Allendale Road
Saddle River, NJ 07458

Phillips, Nizer, Benjamin, Krim & Ballon
By: Alan Mansfield, Esq.
40 West 57th Street
New York, NY 10019
Attorney for Plaintiff

MacFall, Riedl & Miskowski
By: Jeffrey M. Riedl, Esq.
45 North Broad Street
Ridgewood, NJ 07451

Labozzetta & Hass
By Jeffrey K. Hass, Esq.
275 Madison Avenue
New York, NY 10016
(Attorneys for Defendant Turov)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 7, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
DEC 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3) (2) (2)

Nos. 86-487, 86-543 and 86-559

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
and ROBERT M. KOLACZYINSKI,
Petitioners,

v.

ESTELLE JACOBSON and CYNTHIA CARSON,
Respondents.

PAINE, WEBBER, JACKSON & CURTIS, INC.,
SMITH BARNEY, HARRIS UPHAM & CO., INC.
and DONALD J. PORTER,
Petitioners,

v.

MARILYN E. BURRIS
Respondent.

DEAN WITTER REYNOLDS, INC.,
Petitioner,

v.

HERBERT BLUMENTHAL,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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CONSOLIDATED BRIEF IN RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

1. Whether a pre-dispute agreement to arbitrate federal statutory claims is unenforceable where (1) Congress has conferred exclusive jurisdiction upon the federal courts to decide the claims; (2) Congress has not empowered the parties, by agreement or otherwise, to confer jurisdiction of claims on any other tribunal; and (3) arbitrators have no inherent power beyond that conferred by agreement of the parties to decide any of the parties' claims;

2. Whether a pre-dispute agreement to arbitrate a private cause of action under federal statutes is enforceable where such actions advance the public purposes of a federal, statutory, remedial scheme; and

3. Whether a pre-dispute agreement which waives the provisions of Section 27 of the Securities Exchange Act of 1934 in the context of claims asserted under Section 10(b) of that Act is unenforceable under Section 29(a) thereof as a stipulation waiving compliance with any provision of the Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-487, 86-543 and 86-559

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
and ROBERT M. KOLACZYINSKI,
Petitioners,

v.

ESTELLE JACOBSON and CYNTHIA CARSON,
Respondents.

PAINE, WEBBER, JACKSON & CURTIS, INC.,
SMITH BARNEY, HARRIS UPHAM & CO., INC.
and DONALD J. PORTER,
Petitioners,

v.

MARILYN E. BURRIS
Respondent.

DEAN WITTER REYNOLDS, INC.,
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v.

HERBERT BLUMENTHAL,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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CONSOLIDATED BRIEF IN RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the petitions for certiorari, the following is relevant to these cases:

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78 aa.

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

STATEMENT OF THE CASE—PROCEDURAL POSTURE OF THIS CONSOLIDATED RESPONSE

The respondents are Estelle Jacobson and Cynthia Carson (the "Jacobson respondents"), appellants and cross-appellees in *Estelle Jacobson and Cynthia Carson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., and Robert M. Kolaczyinski*, 797 F.2d 1197 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259

(U.S. September 25, 1986) (No. 86-487) ("*Jacobson*"); Marilyn E. Burris ("Burris"), appellee in *Burris v. Paine, Webber, Jackson & Curtis, Inc.*, decided *sub. nom. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, petition for cert. filed,* 55 U.S.L.W. 3295 (U.S. October 1, 1986) (No. 86-543) (the "*Burris* case"); and Herbert Blumenthal ("Blumenthal"), appellee in *Herbert Blumenthal v. Dean Witter Reynolds, Inc. and Daniel J. Turov,* decided *sub nom. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, petition for cert. filed,* 55 U.S.L.W. 3296 (U.S. October 7, 1986) (No. 86-559) (the "*Blumenthal* case").

The respondents do not dispute the accuracy of the statements of facts set forth in the petitions for a writ of certiorari in these cases. They believe it is helpful to add a comment on the procedural posture of this response.

Following service of the petition for a writ of certiorari in *Jacobson,* the Jacobson respondents, by their counsel, advised the Court by letter that they waived their rights to make a response. In the *Burris* case and the *Blumenthal* case, Burris and Blumenthal elected to make no response. Thereafter, by letter from the Clerk of Court dated November 17, 1986, this Court requested the Jacobson respondents, Blumenthal and Burris to file a response to the petitions for writs of certiorari in these cases. The Jacobson respondents, Burris and Blumenthal, are now complying with that request. In the interests of economy, the respondents have elected to file a consolidated response.

REASONS FOR GRANTING OR FOR NOT OPPOSING THE GRANT OF A WRIT OF CERTIORARI

Among other reasons, the petitioners have argued that a writ of certiorari should be issued to the Third Circuit Court of Appeals in these cases because there is a conflict among the United States Courts of Appeal on the issue of the enforceability of pre-dispute agreements to arbitrate claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act") and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO").

Because of the conflict among the Courts of Appeal, the Jacobson respondents and Burris agree that a writ of certiorari should be granted. Blumenthal takes no position whether the Court should issue a writ of certiorari for any reason.

I.

THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934

As the Third Circuit Court of Appeals noted in these cases,

> . . . [O]ur holding that Section 10(b) claims are not arbitrable is consistent with the Court of Appeals for the Ninth Circuit decision in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) but conflicts with the holding of the Court of Appeals for the Eighth Circuit in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1199 n.2.

Before the Third Circuit's ruling in these cases, the Second Circuit, in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 107 U.S. 60 (U.S. October 6, 1986) (No. 86-44) ("McMahon"), held that pre-dispute agreements to arbitrate claims asserted under Exchange Act Section 10(b) ("Section 10(b)") are not enforceable. After the Third Circuit's decision in this case, the Courts of Appeal for the Fifth, Ninth and Eleventh Circuits also held that pre-dispute agreements to arbitrate claims arising under Section 10(b) are not enforceable.[1] The Eighth Circuit's decision in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d

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[1] *Bustamante v. Rotan Mosle, Inc.*, 802 F.2d 815 (5th Cir., 1986); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir., 1986), *petition for cert. filed*, 55 U.S.L.W. 3159 (U.S. August 29, 1986) (No. 86-321); and *Wolfe v. E.F. Hutton & Co., Inc.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*).

(footnote continues)

1393 (8th Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3296 (U.S. Oct. 7, 1986) (No. 86-578) ("*Phillips*"), has recently been joined by the First Circuit's decision in *Page v. Moseley, Halloarten, Estabrook & Weeden, Inc.,* No. 86-1021, slip op. (November 26, 1986) (available on Lexis, Qenfed library, U.S. App. File) ("Page"), holding pre-dispute agreements to arbitrate Section 10(b) claims enforceable.

The conflict among the Circuits is plain and unavoidable. Resolution of the conflict among the Circuits will be necessary to achieve uniform application of federal law. The respondents recognize that, given the national scope of the activities of many brokerage firms, the broad venue provisions of Section 27 of the Securities Exchange Act of 1934 might permit persons otherwise subject to the *Phillips* or *Page* decisions to bring actions in the Third or other Circuits where pre-dispute agreements to arbitrate Section 10(b) claims are enforceable. Respondents also recognize that customers of brokerage firms who have signed predispute arbitration agreements, who would normally choose to bring an Exchange Act action within and who cannot afford to proceed outside the First or Eighth Circuits will be denied the right to proceed in the judicial forum. In respondents' view, this right is properly secured for Exchange Act claimants in the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.

Because there is a conflict among the Courts of Appeal, the respondents cannot in good faith, and do not, oppose the petitions for writ of certiorari in these cases. Beyond that, especially because the Court has issued a writ of certiorari in *McMahon,* the Jacobson respondents and Burris believe that granting a writ of certiorari here will materially assist the Court in resolving the questions presented by these cases. *See,* discussion *infra* at 9-14.

(footnote continued)

In addition, in pre-1986 decisions the Sixth, Seventh and Tenth Circuit Courts of Appeals have held pre-dispute arbitration agreements to be unenforceable. *Mansbach v. Prescott, Ball & Turben,* 598 F.2d, 1017 (6th Cir. 1979), *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 558 F.2d 831 (7th Cir. 1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823 (10th Cir. 1978).

II.

THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AS TO THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

The Third Circuit Court of Appeals' "holding that RICO claims based on non-arbitrable predicate offenses are not arbitrable conflicts with the holding of the Court of Appeals for the Second Circuit in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986)." *Jacobson*, 797 F.2d at 1199, n.2. The Third Circuit's opinion in these cases also conflicts with the decision of the United States Court of Appeals for the First Circuit in *Page* and the decision of the Court of Appeals for the Fifth Circuit in *Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir. 1986) ("*Mayaja*").

To the limited extent that the Third Circuit decision in *Jacobson* and the *Burris* cases holds unenforceable pre-dispute agreements to arbitrate RICO claims predicated solely on violations of federal securities laws, the result does not conflict with the decisions in *McMahon* and *Page*. However, the conflict between the reasoning in the *Jacobson* and *Burris* cases, on the one hand, and in *McMahon* and *Page* on the other, remains. The holding in the *Jacobson* and *Burris* cases does conflict with the holding in *Mayaja*.

To the extent that the Third Circuit in the *Blumenthal* case held enforceable pre-dispute agreements to arbitrate RICO actions predicated on mail and wire fraud, the result is consistent with that reached in *Mayaja*. However, the reasoning in *Mayaja* and in *Blumenthal* is different. The Fifth Circuit in *Mayaja* "respectfully decline[d] to follow the reasoning of the Third Circuit." *Mayaja, Inc. v. Bodkin*, 803 F.2d at 163, n.6.

The conflict among and the confusion resulting from these decisions is apparent. Therefore, the respondents cannot in good faith oppose the granting of the petitions for writ of certiorari in these cases.

III.

RESPONDENTS DISPUTE THOSE ARGUMENTS FOR CERTIORARI WHICH GO TO THE MERITS OF THE COURT OF APPEALS' DECISION IN THESE CASES; BUT BECAUSE THIS COURT HAS ISSUED A WRIT OF CERTIORARI IN *McMAHON*, THE JACOBSON RESPONDENTS AND BURRIS AFFIRMATIVELY URGE THAT A WRIT OF CERTIORARI BE ISSUED SO THAT THEY MAY HAVE AN OPPORTUNITY TO ADDRESS THE MERITS OF THESE ISSUES FULLY.

The petitioners also argue that this Court should issue writs of certiorari in these cases because the Court of Appeals' decision (1) burdens the federal courts with cases arising under the federal securities laws, thus affecting the administration of justice in the federal courts (*Petition for Certiorari* in *Jacobson*, 6-7; *Petition for Certiorari* in the *Burris* case, 10; *Petition for Certiorari* in the *Blumenthal* case, 13); and (2) is fundamentally incorrect in its resolution of the issues both as a matter of analysis (*Petition for Certiorari* in the *Blumenthal* case, 8-10) and as a matter of conflict with the rationale and/or holding of this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985) ("*Mitsubishi*") and *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985) ("Byrd") (*Petition for Certiorari* in *Jacobson*, 9-12; *Petition for Certiorari* in the *Burris* case, 9; and *Petition for Certiorari* in the *Blumenthal* case, 10-13; 19-20). These arguments necessarily reach the merits of the decisions below.[2]

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[2] The petitioners argue that certiorari should be granted because the decision below increases or fails to decrease litigation in the Federal courts. In and of itself, this argument does not address the merits of the decision below and is not a basis for granting the petitions here. It does not follow that parties whose claims under the federal securities laws or RICO have matured and who want to waive those claims in favor of contractually empowering arbitrators to decide similar rights created by contract will not continue to do so, regardless of the decision below. Furthermore, the decision in these cases does not open the federal courts to a class of cases which were not in the federal courts before these cases were decided. Whatever litigation is in the federal courts under the Exchange Act or RICO is there because Congress

(footnote continues)

If the Court had not issued a writ of certiorari in *McMahon,* the respondents would argue that, absent a conflict among the Circuit Courts of Appeal, the merits of the decision in these cases do not warrant review by this Court. However, the Court will likely address the same merits issues in *McMahon.*

Thus, any argument about merits in these responses becomes one not of opposing certiorari but of attempting to influence the Court's ultimate decision on the merits. This would seem best done in a brief on the merits, with an opportunity for both respondents and petitioners to fully address the issues. Thus, the question for respondents becomes whether they should simply limit their response to not opposing the petitions for certiorari and address the merits issues in briefs *amicus curiae* in *McMahon* or whether they should affirmatively urge the Court to grant the petitions in these cases.

(footnote continued)

intended for it to be there, an intent made clear in Congress' mandate of exclusive jurisdiction in the federal courts of all Exchange Act and RICO civil actions. *See, infra,* note 5.

Similarly, although there may be hundreds or even thousands of cases filed in the federal courts under the federal securities laws, it is impossible to determine from the numbers supplied by the petitioners (*Petition* in *Jacobson* at 6, n.8) how many of these cases are otherwise subject to arbitration agreements and how many of these cases arise under the Exchange Act. Perhaps the best measure of the number of cases involving both those factors is the number of reported district court decisions involving the issue of the enforceability of pre-dispute agreements to arbitrate claims under Section 10(b). Appendix D to the *Petition* in the *Jacobson* case shows 107 such cases have been filed in the district courts within the jurisdiction of the twelve United States Courts of Appeal. Thus, on average, approximately nine such cases have been filed in each of the twelve federal judicial circuits. Whether the failure to eliminate those cases supports a petition for certiorari is doubtful in the absence of conflict among the Courts of Appeal.

To the extent that the petitioners' "administration of justice" arguments are predicated on the argument that there would be no increase or would be a decrease in federal court litigation if the Court of Appeals had decided the issues in these cases in accordance with petitioners' views, then these arguments do reach the merits.

For two reasons, the Jacobson respondents and Burris go beyond simply not opposing the petitions in these cases, and urge the Court to issue certiorari and to consolidate these cases with *McMahon.*

First, the *Jacobson* respondents and *Burris* must be uncertain whether or not they will be permitted to file briefs *amicus curiae* in *McMahon.*[3]

Second, even if permitted to file briefs *amicus curiae* in *McMahon,* any such briefs would be more limited than a brief on the merits. Sup.Ct.R. 36.2, 36.3. This may be a significant limitation in that there are a number of arguments on the merits, each of which calls for a careful, thoughtful and detailed analysis. Even the relatively less difficult questions concerning the effect of the non-waiver provisions of Exchange Act Section 29(a), 15 U.S.C. § 78cc(a), on an arbitration agreement's waiver of the provisions of Section 27 of the Exchange Act, 15 U.S.C. § 78aa; the vitality of the core of the *"American Safety"* doctrine [4]; and the relationship of *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Systems, Inc.,* 450 U.S. 728 (1981) and *McDonald v. City of West Branch,* 466 U.S. 284 (1984) to *Mitsubishi* in a non-international setting require detailed analysis. In addition, there is the difficult issue of the scope and effect of *Mitsubishi,* not simply in terms of its applicability to non-international disputes or of the continued vitality of the core of the *American Safety* doctrine, but also in terms of the fundamental arbitrability of substantive federal, statutory rights given that (a) Congress has vested exclusive jurisdiction of Exchange Act and RICO claims in the federal courts,[5] (b) the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), at

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[3] The Jacobson respondents have requested that the *McMahon* parties consent to a brief *amicus curiae.* The *McMahon* respondents have consented. Counsel for petitioners in *McMahon* have refused their consent.

[4] *See, American Safety Equipment Corp. v. J. P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968). *See also, Mitsubishi, supra,* 105 S.Ct. at 3355-60.

[5] Exclusive federal jurisdiction of Exchange Act claims is mandated in Section 27 of the Exchange Act, 15 U.S.C. § 78aa. Exclusive federal jurisdiction of RICO claims is provided for in 18 U.S.C. § 1964(c). As reviewed in *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 105 S. Ct. 3275, 3280-1

(footnote continues)

least on its face, does not purport to empower parties to an arbitration agreement to confer jurisdiction of federal claims on an arbitration tribunal; (c) the Arbitration Act, at least on its face, does not purport to confer any jurisdiction over cases arising under federal law on any arbitration tribunal; (d) there appears to be no inherent power in the parties to a dispute to confer jurisdiction of cases arising under federal law on any tribunal—whether state, federal or otherwise—and especially where Congress (1) has vested federal courts with exclusive jurisdiction and (2) has not itself authorized the parties to consent to adjudication of claims arising under federal law before a tribunal to whom Congress has not specifically transferred jurisdiction as, for example, Congress has done in the United States Magistrate's Act, 28 U.S.C. § 636(c). The Jacobson respondents and Burris believe these arguments and questions will be best explored for the benefit of the parties and the Court in briefs on the merits in these cases.

(footnote continued)

(1985), the legislative history of RICO shows that its private remedy was patterned after the anti-trust prototype of Section 4 of the Clayton Act, 15 U.S.C. § 15. Well before the RICO legislation was enacted, this Court had held that virtually identical jurisdictional language in Section 4 of the Clayton Act conferred exclusive jurisdiction on the federal courts of anti-trust claims. *Freeman v. Bee Machinery Corp.*, 319 U.S. 448, 451 n.6, *reh. denied*, 320 U.S. 809 (1943). As one court has noted, "it would be anomalous . . . to hold that the jurisdictional grant under the RICO statute did anything other than create exclusive federal jurisdiction over civil claims by persons injured by violations of 18 U.S.C. § 1962." *County of Cook v. Midcon Corp.*, 574 F.Supp. 902, 912 (N.D. Ill. 1983).

CONCLUSION

The scope of federal policy favoring enforcement of agreements to arbitrate commercial disputes is the subject of conflict and confusion among the Courts of Appeal. The respondents recognize that the conflict will continue until this Court resolves it. Although they cannot and do not challenge the result or holdings in these cases, the respondents also cannot in good faith dismiss the existence of the conflict or the need to resolve it. Given that fact and given the fact that this Court has granted the petition for certiorari in *McMahon,* the Jacobson respondents and Burris concur with the petitioners that the Court should issue a writ of certiorari to review the decisions below. Blumenthal does not oppose the issuance of a Writ of Certiorari.

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Respectfully submitted,

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